UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

No. 3235.

E. SOHIER WELCH ET AL., Executors,

PLAINTIFFS, APPELLANTS,

v.

THOMAS B. HASSETT, Individually and as Former Acting Collector,

DEFENDANT, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (SWEENEY, J.) FEBRUARY 8, 1937.

TRANSCRIPT OF RECORD.

JOHN L. HALL,
CLAUDE R. BRANCH,
for Appellants.

JAMES W. MORRIS,
ASSISTANT ATTORNEY GENERAL,
SEWALL KEY,
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,
FRANCIS J. W. FORD,
UNITED STATES ATTORNEY,
ARTHUR L. MURRAY,
SPECIAL ASSISTANT TO UNITED STATES ATTORNEY,
for Appellee.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

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E. SOHIER WELCH ET AL., EXECUTORS,
PLAINTIFFS, APPELLANTS,
v.
THOMAS B. HASSETT,
INDIVIDUALLY AND AS FORMER ACTING COLLECTOR,
DEFENDANT, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 6469 LAW DOCKET.

E. SOHIER WELCH AND SYLVESTER BROWN, EXECUTORS OF THE WILL OF FRANK H. BEEBE, PLAINTIFFS,
v.
THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR OF INTERNAL REVENUE, DEFENDANT.

WRIT.

MASSACHUSETTS DISTRICT, SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts, or his Deputy, GREETING:

We command you to attach the goods or estate of Thomas B. Hassett, individually, and as former Acting Collector of Internal Revenue for the District of Massachusetts, in our District of Massachusetts, to the value of one million five hundred thousand (1,500,000) dollars, and to summon the said Thomas B. Hassett, individually and as former Acting Collector as aforesaid (if he may be found in your district) to appear before our Judge of our District Court, next to

be holden at Boston, within and for our said District of Massachusetts, on the second Tuesday of September, 1935. Then and there, in our said court, to answer unto E. Sohier Welch and Sylvester Brown, as they are executors of the will of Frank Huntington Beebe, late of Falmouth in said District, in an action of contract.

To the damage of the said E. Sohier Welch and Sylvester Brown as they are executors as aforesaid (as they say) the sum of 1,500,000 dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable ELISHA H. BREWSTER, at Boston, the seventh day of August in the year of our Lord one thousand nine hundred and thirty-five.

JAMES S. ALLEN, *Clerk,*
by JOSEPH A. DENGELESKI, *Deputy Clerk.*

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss. BOSTON, MASS., August 10, 1935.

Pursuant hereunto I have this day attached a chip as the property of the within named Thomas B. Hassett, and later on the same day I summoned the within named Thomas B. Hassett to appear at court and answer as herein directed, by giving to him in hand, the said Thomas B. Hassett, Assistant Collector of Internal Revenue at Boston, Mass., a true and attested copy of and an original summons to this writ.

JOHN J. MURPHY, *United States Marshal,*
by JOHN P. CLAIR, *Deputy United States Marshal.*

The writ in this cause is dated the seventh day of August, A. D 1935, and was duly entered at the September Term of this court, A. D. 1935, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 10, 1935, the following Declaration was filed:

DECLARATION.

[Filed September 10, 1935.]

COUNT I. The plaintiffs say:

1. They are executors of the will of Frank Huntington Beebe, late of Falmouth, in the County of Barnstable in said District of Massachusetts, who died on November 20, 1932, leaving a will which was duly proved and allowed by the Probate Court of said Barnstable County on December 27, 1932. The plaintiffs were on the same day appointed executors of said will, qualified by giving bond and notice of their appointment as provided by law, and are still acting as such executors.

2. The defendant is a resident of Fitchburg in said District of Massachusetts and was from May 2, 1935, to July 8, 1935, duly qualified Acting United States Collector of Internal Revenue for said District.

3. This action arises under the laws of the United States of America providing for internal revenue and is brought by the plaintiffs, under Section 3226 of the Revised Statutes of the United States as amended, against the defendant individually and as former Acting United States Collector of Internal Revenue for the District of Massachusetts, to recover estate tax wrongfully and illegally assessed against the plaintiffs and collected from them by the defendant as Acting United States Collector of Internal Revenue as aforesaid, assuming to act under the Revenue Act of 1926 as amended by the Revenue Act of 1928, by the Joint Resolution of March 3, 1931, and by the Revenue Act of 1932, under the circumstances and in the manner hereinafter set forth, together with interest on the taxes so assessed and collected.

4. On or about November 14, 1933, the plaintiffs filed with the Collector of Internal Revenue for said District of Massachusetts the estate tax return, so called, Treasury Department Form 706, prepared by them in accordance with the provisions of the Revenue Acts, and regulations pertaining thereto, in force and applicable at the date of said Beebe's death. In Schedule E of said return the plaintiffs reported as items 2 to 6, both inclusive, five transfers, each

of amounts in excess of five thousand (5,000) dollars, made by said decedent during his lifetime, but the value of the property so transferred was not included by the plaintiffs in computing the total gross estate for the reasons, as stated in said return, that they believed and therefore averred that not one of said transfers was made in contemplation of death and that as a matter of law none of the transfers could be taxed on any other theory. As computed by the executors in said return the total gross estate amounted to three million two hundred fifty-five thousand seven hundred forty-eight and 59/100 (3,255,748.59) dollars and the total net tax (after proper credit for estate inheritance, legacy and succession taxes) to three hundred thirty-seven thousand seven hundred eighty-five and 72/100 (337,785.72) dollars, which tax was paid by plaintiffs to said collector at the time of filing said return.

5. On or about February 11, 1935, the plaintiffs received from the Commissioner of Internal Revenue a ninety day letter, so called, dated February 8, 1935, advising that a deficiency of seven hundred fifty-seven thousand two hundred five and 34/100 (757,205.34) dollars in federal estate tax liability had been determined, and that

> "In view of all the evidence in the record, the Bureau has determined that the transfers listed in the tentative letter were testamentary in character, and were made in contemplation of death, and to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926."

A copy of said letter, marked "Exhibit A", is annexed hereto and hereby made a part hereof. Almost all such deficiency resulted from the inclusion of the value of the property transferred as aforesaid, the balance of such deficiency having been caused by certain readjustments acceptable to the plaintiffs.

6. Said ninety day letter also advised the plaintiffs that, upon receipt of a waiver, five hundred fourteen thousand seven hundred eighteen and 92/100 (514,718.92) dollars of the deficiency would be assessed, and that as the balance of the deficiency might be eliminated by credit for State estate, inheritance, legacy or succession taxes, opportunity would be afforded for the submission of evidence of the

payment thereof as required by Article 9 of Estate Tax Regulations No. 80. In order to save interest by expediting an early assessment of the deficiency, the plaintiffs executed and filed with the Commissioner of Internal Revenue on or about March 19, 1935, Treasury Form No. 890, waiver and consent to the assessment and collection of a deficiency in federal estate tax, in the sum of five hundred fourteen thousand seven hundred eighteen and 92/100 (514,718.92) dollars, together with interest thereon as provided by law. A copy of said waiver, marked "Exhibit B", is annexed hereto and hereby made a part hereof.

7. On or about April 15, 1935, the plaintiffs received from the office of the Collector of Internal Revenue at said Boston a notice and demand for estate tax (Treasury Form 880) in the amount of five hundred fifty-six thousand two hundred sixty-three and 9/100 (556,263.09) dollars, of which five hundred fourteen thousand seven hundred eighteen and 92/100 (514,718.92) dollars represented the deficiency in estate tax above referred to and forty-one thousand five hundred forty-four and 17/100 (41,544.17) dollars interest thereon; and on May 2, 1935, the plaintiffs paid the same to the defendant.

8. On May 31, 1935, the plaintiffs filed with the Collector of Internal Revenue at said Boston Treasury Form No. 843, claim for refund of five hundred fifty-three thousand eight hundred eighteen and 94/100 (553,818.94) dollars, being so much of said deficiency and interest as resulted from the inclusion in the gross estate of the value of the property transferred as aforesaid, together with interest thereon as prescribed by law; and on or about June 1, 1935 the plaintiffs filed with the Commissioner of Internal Revenue in Washington, D. C., a duplicate original thereof. A copy of said Form 843 as so filed, marked "Exhibit C", is annexed hereto and hereby made a part hereof.

9. On or about June 11, 1935 the Commissioner of Internal Revenue rejected said claim for refund and by letter dated June 11, 1935, notified the plaintiffs that said claim for refund was rejected in its entirety. A copy of said letter, marked "Exhibit D", is annexed hereto and hereby made a part hereof.

10. Five transfers in trust reported by the plaintiffs as items 2 to

6, both inclusive, in Schedule E of said estate tax return were erroneously and wrongfully included by the Commissioner of Internal Revenue in the gross estate of said decedent in computing said estate tax. None of said transfers in trust were made by the decedent in contemplation of or were intended to take effect in possession or enjoyment at or after his death; nor did the decedent retain any power with respect to any of said transfers in trust, nor were any of said transfers in trust subject to any right retained by the decedent to alter, amend or revoke the same or to designate the persons who should possess or enjoy the property or the income therefrom. Insofar as the decedent retained any right to the income from any of the property so transferred in trust,—or any possibility of the possession or enjoyment of such property,—as in the case of the trust dated February 13, 1924, and reported as Item 3 in said Schedule E,—such property (the said trusts having been created prior to March 3, 1931) can not properly be included in the decedent's gross estate under any proper construction of Section 302 (c) of the Revenue Act of 1926 as amended. Moreover, if said Section 302 (c) is capable of being construed so as to require or permit the inclusion, in the decedent's gross estate, of any of such property so transferred in trust the said section so construed is invalid and void as being repugnant to and in contravention of the Constitution of the United States and particularly of Article V in amendment thereof; and the action of said Commissioner in including such property in the gross estate of the decedent and in computing and levying an estate tax thereon and the action of the defendant in collecting an estate tax thereon deprived the plaintiffs, as executors as aforesaid, and said estate of Frank H. Beebe, of property without due process of law, in violation of said Constitution and particularly Article V in amendment thereof.

Wherefore, the plaintiffs say that the defendant has illegally collected from them the sum of five hundred fifty-three thousand eight hundred eighteen and 94/100 (553,818.94) dollars, contrary to the provisions of the applicable revenue act, and that the defendant owes the plaintiffs said sum plus interest at six percent per annum from May 2, 1935, until the same is repaid.

COUNT II. The plaintiffs say that the defendant owes them the

sum of five hundred fifty-three thousand eight hundred eighteen and 94/100 (553,818.94) dollars plus interest at six percent per annum from May 2, 1935, for money received by the defendant to the plaintiffs' use.

By their Attorneys,

JOHN L. HALL,
CLAUDE R. BRANCH,
CHOATE, HALL & STEWART,
HENRY HIXON MEYER,
EDWARD C. THAYER,
ROCKEMAN, SAWYER & BREWSTER,

W. B. M.

EXHIBIT A.

MT–ET–C1–10301—Massachusetts Estate of Frank H. Beebe
Date of death—November 20, 1932

Feb. 8, 1935

E. Sohier Welch, et al., Executors, 73 Tremont Street, Boston, Massachusetts.

Sirs: A deficiency of $757,205.34 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING, Commissioner

By D. S. Bliss, Deputy Commissioner

Enclosures: Statement, Waiver, Form 890.

The estate's protest is directed (1) to the inclusion in the gross estate of $9,470.14 for accrued interest on bonds in default (2) the inclusion of $18,816.91 cash under Item 6 "Schedule E", and (3) the inclusion in the gross estate of the transfers of property reported in Schedule E of the return. Additional deductions were also claimed for miscellaneous administration expenses. In view of all the evidence in the record, the Bureau has determined that the transfers listed in the tentative letter were testamentary in character, and were made in contemplation of death, and to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926. As a result of the protest, the following adjustments are made:

Gross Estate

Stocks and Bonds	Returned	Tentatively Determined	Determined
Interest on bonds in default	0.00	$9,470.14	0.00
Transfers			
Item 6	0.00	$2,399,035.50	$2,381,918.59

	Deductions		
Miscellaneous administration expenses	$43,778.53	$27,113.05	$43,342.11

The foregoing adjustments are reflected in the following summary:

Gross estate	$3,255,748.59	$5,904,541.41	$5,877,954.36
Deductions (1926 Act)	563,861.45	549,531.19	565,760.25
Net estate (1926 Act)	$2,691,887.14	$5,355,010.22	$5,312,194.11
Net estate (1932 Act)	$2,741,887.14	$5,405,010.22	$5,362.194.11
Gross tax (1926 Act)	$204,607.59	$556,751.53	$550,329.12
Credit for State estate, inheritance, legacy, or succession taxes	163,686.07	197,776.88	197,776.88
Net tax (1926 Act)	$40,921.52	$358,974.65	$352,552.24
Total gross taxes (1926 and 1932 Acts)	$501,471.79	$1,307,753.58	$1,292,767.94
Gross tax (1926 Act)	204,607.59	556,751.53	550,329.12
Net additional tax	$296,864.20	$751,002.05	$742,438.82
Net tax (1926 Act)	40,921.52	358,974.65	352,552.24
Total net tax	$337,785.72	$1,109,976.70	$1,094,991.06
Deficiency		$772,190.98	$757,205.34

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals $514,718.92 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations No. 80. If, after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six percent per annum from one year after the decedent's death to the date of assessment,

or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

EXHIBIT B.

WAIVER OF RIGHT TO FILE PETITION WITH THE UNITED STATES BOARD OF TAX APPEALS AND CONSENT TO ASSESSMENT AND COLLECTION OF DEFICIENCY IN ESTATE TAX.

MT-ET-C1-10301 District of Massachusetts

Pursuant to the provisions of Section 308 (d) of the Revenue Act of 1926, the undersigned executors of the estate of Frank H. Beebe waives the restrictions provided in Section 308 (a) of the Revenue Act of 1928, and consents to the assessment and collection of a deficiency in estate tax in the sum of $514,718.92, together with interest thereon as provided by law.

By executing and filing this waiver, we do not admit the propriety of the deficiency which has been asserted. We execute and file this waiver merely to save payment of interest by expediting an early assessment of the tax.

We hereby expressly reserve our rights to file claims for refund and, without limiting the generality of the foregoing, specifically to file a claim for refund of so much of the alleged deficiency referred to above as is based upon the inclusion in the gross estate of the decedent of certain transfers made by him during his lifetime.

E. SOHIER WELCH
SYLVESTER BROWN
Executors

Date March 15, 1935. 73 Tremont Street, Boston, Mass.

NOTE.—This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 606 of the Revenue Act of 1928, but its execution and filing at the address shown in the accompanying letter will expedite the adjustment of your estate tax liability as indicated above.

EXHIBIT C.

CLAIM

To be Filed with the Collector where Assessment was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Massachusetts
County of Suffolk, ss.

Name of taxpayer or purchaser of stamps E. Sohier Welch and Sylvester Brown, Executors of the will of Frank Huntington Beebe, Business address 73 Tremont Street, Boston, Mass.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Massachusetts
2. Period (if for income tax, make separate form for each taxable year) from , 19 , to 19
3. Character of assessment of tax Estate tax
4. Amount of assessment, $556,263.09; dates of payment May 2, 1935
5. Date stamps were purchased from the Government
6. Amount to be refunded $553,818.94 with (interest from date of payment as provided by law.)
7. Amount to be abated (not applicable to income or estate taxes)
8. The time within which this claim may be legally filed expires, under Section 810 of the Revenue Act of 1932, on May 2, 1938

The deponent verily believes that this claim should be allowed for the following reasons:

On February 13, 1924, three transfers by deeds of trust were made by the said Frank H. Beebe, and were reported by the deponents as

Items 2, 3 and 4 in Schedule E of the return (Form 706) filed by them in the Massachusetts District on November 14, 1933; another transfer by deed of trust was made by said decedent on March 5, 1924, and was reported as Item 5 in Schedule E of said return; and a fifth transfer by deed of trust was made by said decedent on October 22, 1926, and reported as Item 6 in Schedule E of said return. Frank H. Beebe died on November 20, 1932.

The Commissioner of Internal Revenue, in a ninety-day letter dated February 8, 1935, addressed to the deponents, advised them that "In view of all the evidence in the record, the Bureau has determined that the transfers listed in the tentative letter were testamentary in character, and were made in contemplation of death, and to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926".

Said ninety-day letter also advised the deponents that the Bureau had determined that the value of the property transferred by the five deeds of trust was $2,381,918.59; that the value of the gross estate of Frank H. Beebe was $5,877,954.36; that a deficiency estate tax of $757,205.34 was due thereon; that $514,718.92 of the deficiency, together with interest accrued thereon, would be assessed; and, as the balance of the deficiency might be eliminated by credit for state estate, inheritance, legacy or succession taxes, an opportunity would be accorded for the submission of evidence, required by Article 9 of Estate Tax Regulations No. 80, showing payment of such taxes.

On April 12, 1935, a deficiency of $556,263.09 was assessed by the Treasury Department, which included $514,718.92, the principal amount of the deficiency above referred to, together with $41,544.17 as interest thereon, which deficiency was paid by the deponents on May 2, 1935.

The deponents hereby claim the right to a refund of $553,818.94 being that part of the alleged deficiency which was assessed and paid upon the value of the property included in said five transfers made by Frank H. Beebe prior to his death and referred to above, with interest from date of payment as provided by law.

Your deponents contend that these transfers were not testamentary in character, and were not made by said Frank H. Beebe "in contemplation of or intended to take effect in possession or enjoyment at

or after his death" within the meaning of Section 302 (c) of the Revenue Act of 1926; and that if they were within the meaning of said provisions of Section 302 (c) of the Revenue Act of 1926, said provisions, as applied to said transfers, are invalid and void as they conflict with the provisions of Article V of the Amendments to the Constitution of the United States, inasmuch as said provisions, if applied to said transfers, would deprive your deponents and the Estate of Frank H. Beebe of property without due process of law.

Your deponents contend that the property included in said transfers could not legally be included in the gross estate of the decedent under any applicable provisions of law, and that if any provisions of any statute purport to authorize the inclusion thereof, such provisions are invalid and void, as they conflict with the provisions or Article V of the Amendments to the Constitution of the United States, inasmuch as such provisions, if applied to said property, would deprive your deponents and the Estate of Frank H. Beebe of property without due process of law.

E. SOHIER WELCH
SYLVESTER BROWN
Executors

Sworn to and subscribed by the said Sylvester Brown before me this 17th day of May, 1935.

Eleanor S. Muir,
Notary Public.

My commission expires Apr. 6, 1939.

German Reich State of Bavaria
Consulate General of the United
States of America at Munich
City of.

Consulate General of the United States of America, ss.

Sworn to and subscribed by the said E. Sohier Welch, before me, this 3rd day of May 1935.

J. M. BOWCOCK
JAMES M. BOWCOCK
Vice Consul of the United States of America
at Munich, Germany

Fee No. 45 Service No. 1017 $——— U. S. Currency no rec

EXHIBIT D.

Henry H. Meyer, Attorney at Law,
c/o Rackemann, Sawyer and Brewster,
53 State Street, Boston, Massachusetts.

ME–ET–C1–10301—Massachusetts June 11, 193:
Estate of Frank H. Beebe
Date of death—November 20, 1932

E. Sohier Welch, et al., Executors, 73 Tremont Street, Boston, Massachusetts.

Sirs: The Bureau has examined the claim filed by you on June 1, 1935, on behalf of the above-named estate for refund of $553,818.94 Federal estate tax paid under the Revenue Acts of 1926 and 1932.

The claim arises in connection with the following items:

Gross Estate

Transfers	Returned	Tentatively Determined	Determined
Items 2 and 5	$ 0.00	$ 114,691.33	$ 114,691.33
Item 3	0.00	21,489.87	21,489.87
Item 4	0.00	88,250.31	88,250.31
Item 6	0.00	2,381,918.59	2,381,918.59
Total	$ 0.00	$2,606,350.10	$2,606,350.10

A review has been made of the record in this case and of all the evidence submitted and the Bureau holds that all the property listed under the above schedule is subject to Federal estate tax under the provisions of Section 302 (c) of the Revenue Act of 1926 since the transfers were testamentary in character and were made in contemplation of death and to take effect in possession or enjoyment at or after the date of the decedent's death.

In view of the above and since there appears to be no over-assessment of tax in this case, the claim for refund is rejected in its entirety. Respectfully,

GUY T. HELVERING, Commissioner
By D. S. Bliss, Deputy Commissioner

At the same term, to wit, October 1, 1935, an answer was filed.

Also at the same term, to wit, October 8, 1935, the following Waiver of Jury Trial was filed:

WAIVER OF JURY TRIAL.

[Filed October 8, 1935.]

It is hereby agreed by the parties hereto that trial by jury is waived.

JOHN L. HALL,
Attorney for the Plaintiff.

FRANCIS J. W. FORD,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued to the December Term, A. D. 1935, when, to wit, February 14, 1936, the following Defendant's Amended Answer was filed by consent:

DEFENDANT'S AMENDED ANSWER.

[Filed by Consent February 14, 1936.]

Now comes the defendant in the above-entitled action and for his amended answer to the declaration on file herein admits, denies and alleges as follows:

1. The defendant admits the allegations contained in paragraph 1 of the plaintiffs' declaration.

2. The defendant admits the allegations contained in paragraph 2 of the plaintiffs' declaration.

3. The defendant denies that the estate tax referred to in paragraph 3 of the plaintiffs' declaration was wrongfully or illegally assessed against the plaintiffs and wrongfully or illegally collected from them by the defendant.

4. The defendant admits the allegations contained in paragraph 4 of the plaintiffs' declaration, but denies the plaintiffs' allegations in said paragraph that "not one of the said transfers was made in contemplation of death and that as a matter of law none of the transfers could be taxed on any other theory".

5. The defendant admits the allegations contained in paragraph 5 of the plaintiffs' declaration.

6. The defendant admits the allegations contained in paragraph 6 of the plaintiffs' declaration.

7. The defendant admits the allegations contained in paragraph 7 of the plaintiffs' declaration.

8. The defendant admits the allegations contained in paragraph 8 of the plaintiffs' declaration, but specifically denies the allegations contained in the copy of Form 843 marked "Exhibit C", which is annexed to and made a part of said declaration.

9. The defendant admits the allegations contained in paragraph 9 of the plaintiffs' declaration.

10. The defendant denies each and every allegation contained in paragraph 10 of the plaintiffs' declaration.

11. The defendant expressly alleges that the five transfers in trust reported by the plaintiffs as items 2 to 6, both inclusive, in Schedule E of the estate tax return were made in contemplation of death and intended to take effect in possession or enjoyment at or after death under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended, and that the property purported to be transferred by said purported trusts, items 2 to 6, both inclusive, should be included in the gross estate of the decedent.

12. The defendant alleges that on February 13, 1924, the decedent created a trust to transfer certain property comprising the same property covered by the purported transfer in trust under date of October 22, 1926, reported as item 6 in Schedule E of the plaintiffs' estate tax return, and that said transfer of trust of February 13, 1924, was made in contemplation of death and intended to take effect in possession or enjoyment at or after death under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended.

13. In the alternative, the defendant alleges that each of the two purported transfers in trust dated February 13, 1924, and October 22, 1926, comprising the property reported by the plaintiffs in item 6 of Schedule E of the estate tax return, was void and ineffective to transfer the property covered therein, and that said property remained

the property of the decedent and should be included in his gross estate.

14. The defendant alleges that, in any event, the purported transfers in trust reported by the plaintiffs as item 2 to 6, both inclusive, in Schedule E of the estate tax return and the transfer in trust dated February 13, 1924, comprising the same property purported to be transferred by the trust dated October 22, 1926, and reported as item 6 in Schedule E of the said estate tax return, are each and all subject to the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by the Act of March 3, 1931, and that the property covered by each and all of said purported transfers in trust should be included in the gross estate of the decedent under said section of the statute, as amended.

15. The defendant denies that it is indebted to the plaintiffs in any sum whatsoever for money received by the defendant to the plaintiffs' use.

16. The defendant denies each and every allegation contained in the plaintiffs' declaration not heretofore specifically admitted.

Wherefore, the defendant requests that the declaration of the plaintiffs be dismissed and that the defendant recover his costs and disbursements incurred in this proceeding.

By his Attorney,

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

No objection to filing.

CLAUDE R. BRANCH,
Attorney for Plaintiffs.

February 17, 1936.

At the same term, on the twenty-fifth, twenty-sixth, twenty-seventh and twenty-eighth days of February, A. D. 1936, said cause came on for trial without a jury, the Honorable George C. Sweeney, United States District Judge, sitting.

On the said twenty-eighth day of February, A. D. 1936, a defendant's motion for judgment was filed.

This cause was thence continued from term to term to the June Term, A. D. 1936, when, to wit, July 20, 1936, said cause came on for further hearing, the Honorable George C. Sweeney, United States District Judge, sitting as aforesaid, findings and rulings being made by the court, to which exceptions of both parties were saved.

On the said twentieth day of July, A. D. 1936, a petitioners' motion for judgment and defendant's motion for judgment were denied by the court, exceptions of the respective parties being saved.

Also on the same day an opinion of the court was announced.

This cause was thence continued to the September Term, A. D. 1936, when, to wit, September 12, 1936, a plaintiffs' bill of exceptions was filed within extended time.

On the thirtieth day of November, A. D. 1936, amendments to plaintiffs' bill of exceptions were filed and allowed.

On the said thirtieth day of November, A. D. 1936, the aforementioned plaintiffs' bill of exceptions was allowed by the court.

This cause was thence continued to the present December Term, A. D. 1936, when, to wit, February 2, 1937, the following Stipulation as to Computation of Judgment is filed and approved:

STIPULATION AS TO COMPUTATION OF JUDGMENT.

[Filed February 2, 1937.]

The parties hereto, without waiving any contention heretofore made or any right to appeal which either of them may have, hereby agree that the amount of judgment for the plaintiffs to be entered is $54,364.64, with interest from April 12, 1935, this being the amount which should be refunded under the decision of the District

Court and allowing the plaintiffs the maximum credit for state taxes to which they would be entitled on the basis of that decision.

E. SOHIER WELCH AND
SYLVESTER BROWN,
Executors of the Will of
Frank Huntington Beebe,
by their Attorneys,
JOHN L. HALL,
CLAUDE R. BRANCH,
CHOATE, HALL & STEWART.

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Approved 2–2–37. GEO. C. SWEENEY.

On the eighth day of said February, A. D. 1937, the following Plaintiffs' Motion for Entry of Judgment is filed and allowed:

PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT.
[Filed and Allowed February 8, 1937.]

Now come the plaintiffs in the above-entitled cause and move for the immediate entry of judgment.

By their Attorneys,
JOHN L. HALL, R.,
CLAUDE R. BRANCH, R.,
CHOATE, HALL & STEWART.

2–8–37. GEO. C. SWEENEY

Thereupon, to wit, February 8, 1937, it is considered by the court on the finding of the court, the Honorable George C. Sweeney, District Judge, sitting, that the said E. Sohier Welch and Sylvester Brown, plaintiffs, recover of Thomas B. Hassett, individually and as former Acting United States Collector of Internal Revenue for the District of Massachusetts, defendant, the sum of fifty-four thousand

three hundred sixty-four dollars and sixty-four cents ($54,364.64) damages, together with the sum of five thousand nine hundred forty-three dollars and eighty-seven cents ($5,943.87), interest from April 12, 1935, as computed in stipulation, and their costs of suit taxed at

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OPINION.

July 20, 1936.

[15 Fed. Supp. 692.]

SWEENEY, J. This is an action at law to recover estate taxes alleged to have been illegally assessed and collected. The plaintiffs are the executors of the will of Frank H. Beebe, who died on November 20, 1932. The will of the decedent, under which the plaintiffs were named as executors, was duly proved and probated on December 27, 1932.

Five trusts which were set up by the decedent during his lifetime were declared by the Commissioner of Internal Revenue to have been testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment at or after the death of the decedent. It would follow that under Section 302 (c) of the Revenue Act of 1926, the value of these trusts should have been included in the gross estate of the decedent subject to estate tax. As a result of the finding of the Commissioner of Internal Revenue, the gross estate of the decedent was determined to be $5,877,954.36. The net estate was determined to be $5,312,194.11, resulting in a total estate tax of $1,094,991.06 after the allowance of certain credits. On this computation a deficiency of $757,205.34 was determined, of which $514,718.92 principal and $41,544.17 interest were paid on May 2, 1935. The balance of the deficiency, namely, $242,486.42, has been withheld from assessment in view of the instant litigation, and in order that the executors might have an opportunity to claim further credit for State inheritance tax payments.

On May 31, 1935, the plaintiffs filed with the Commissioner of Internal Revenue a claim for refund in the amount of $553,813.94 on the ground that the five transfers declared by the Commissioner to have been testamentary in character, made in contemplation of death, and to take effect in possession or enjoyment after the death

of the decedent were not such either in fact or law. The claim for refund was rejected by the Commissioner on June 11, 1935.

Findings of Fact.

The decedent was the son of James M. Beebe who died about 1875, and whose estate early in 1919 was being administered by E. Pierson Beebe, a brother of the decedent, and Francis C. Welch, the father of the plaintiff Welch, as co-trustees. This estate in 1919 was worth about three million dollars.

Up to 1919 E. Pierson Beebe, in addition to administering the estate of James M. Beebe, had the investment and management of the estate of the decedent, although under no instrument of trust or other legal relationship. By his advice and his activities in behalf of the decedent he had materially increased the decedent's estate. Some time in 1919 Francis C. Welch, one of the co-trustees of the James M. Beebe estate, died, and his son, E. Sohier Welch, a plaintiff here, succeeded him as co-trustee of that estate. On March 1, 1919, E. Pierson Beebe was declared, by a court of competent jurisdiction, to be an insane person, and incapable of caring for himself, and the decedent succeeded him as a co-trustee of the estate of James M. Beebe.

On April 8, 1919, Frank H. Beebe and E. Sohier Welch were appointed guardians of the person and estate of E. Pierson Beebe, and continued as such until his death on August 8, 1926. At the time of the appointment of guardians the estate of E. Pierson Beebe was worth between six and seven million dollars. Welch later became the guardian of C. Philip Beebe, who was adjudged insane about 1920, and whose estate was worth approximately two or three million dollars.

As a co-guardian of E. Pierson Beebe, the decedent had the custody of a will which had been drawn by E. Pierson Beebe prior to his having been declared incompetent. Under this will the decedent was to receive one-half of the E. Pierson Beebe estate.

Upon assuming the co-guardianship of the estate of E. Pierson Beebe, and the co-trusteeship of the estate of James M. Beebe, the decedent retained the old offices and clerks of E. Pierson Beebe at

No. 6 Beacon Street, Boston. At first he becamee active in the management of these two trusts, frequently consulting Welch with regard to management and investment. The decedent was enjoying excellent health, and was a man of wealth in his own right. Up to this time his interests had not been those of a business man. He loved art, music, flowers and pictures; was a regular patron of the opera and concerts; spent much of his time in the woods among the trees and flowers, and annually planned the flower garden for his huge summer estate at Falmouth. He was fond of animals; was a collector of paintings and pictures. He was not interested in the business world, and many times expressed a distate for it. He had followed the pursuits of a true gentleman of leisure whose tastes were aesthetic.

After a short time he became dissatisfied with the burdens he had assumed, and in April of 1921, desiring to be relieved of them, and at the suggestion of the plaintiff Welch, secured the services of Sylvester Brown, who became the office manager for the decedent. Brown's activities were principally in connection with the estate of James M. Beebe, and the co-guardianship of the estate of E. Pierson Beebe. Gradually he took over nearly all of the decedent's work as co-trustee and co-guardian.

The decedent was fond of travel, and made frequent trips to Europe. In the summer of 1923, while visiting in England, he had some bladder trouble, consulted a physician, and was catheterized by him. During the last week of February 1924 the decedent consulted his family physician, told him of his experience in London, and of the fact that the English physician had advised that an operation would be necessary. He was referred by his physician to a specialist. After consultation with the specialist, and about February 25, 1924, the decedent advised his housekeeper that he was going to submit to an operation, and that he was going to Falmouth for a couple of weeks of rest before submitting to it. She advised against the delay, and on February 29th he entered the hospital for the operation. After a period of pre-operative rest, a prostatectomy was performed on March 5th. At that time the decedent was nearing his seventy-first birthday. A short time later a secondary operation was per-

formed. After a normal convalescence, the decedent was discharged from the hospital on April 15, 1924, and, after regaining his strength, continued in good health until shortly before his death on November 20, 1932. Death was due to myocarditis and arteriosclerosis which had their inception about two months before his death.

Prior to the first of January, 1924, the decedent had made modest financial contributions to relatives and persons close to him. Some time between the 1st and the 15th of January the decedent first discussed with E. Sohier Welch the possibility of creating certain trusts in order that he might be relieved of the importunities of these relatives and friends, and in order that the beneficiaries of his generosity would receive regular payments from the trust rather than the hit or miss gifts that he had previously made to them. A second conference was held between the two during which the provisions of the trusts were discussed, and on February 13, 1924, the decedent executed four trusts which will hereinafter be referred to as trusts A, B, C and D. On the same day he also attempted to create a fifth trust which will hereinafter be referred to as the Frank H. Beebe trust, and which will be separately discussed. Two days later he made changes in his will so as to avoid the possibility of a duplication of gifts.

Trust A, in the amount of $25,000, was to run for a period of twenty years, unless earlier terminated by the trustees. As a matter of fact, this trust was terminated prior to the death of the decedent, and the principal was distributed before his death. The income from this trust had been paid two-fifths to a lawyer friend, one-fifth to a clergyman, and two-fifths to the caretaker of the decedent's estate. Upon the termination of the trust, one of the beneficiaries of the trust having died, one-fifth part of the principal was returned to the decedent in accordance with the terms of the trust. The other four-fifths were distributed in equal shares to the other beneficiaries named in the trust. Regardless of the facts surrounding the creation of the trust, at its termination, the transfer was complete, and the decedent had parted with his entire interest in the fund.

Trust B was in the amount of $100,000, and was for the benefit of Mary Van Arnam Brown, a first cousin of the decedent. Up to

the time of the creation of this trust, the decedent had augmented her moderate income by giving her sufficient to live on. Under the trust she received between $4500 and $5000 a year. The trust further provided that after the death of the said Mary Van Arnam Brown the income was to be distributed among a class of people to the last survivor, and after the death of the last survivor, the principal of the trust, as it then existed, was to be distributed among the living issue of the class referred to per stirpes. Under this trust it is apparent that the decedent parted with all interest in the trust fund, and that the transfer was complete.

Trust C, in the amount of $125,000, provided that the income from that fund should be payable in stipulated amounts to certain employees and friends of the decedent during the term of the trust, and upon the death of the last survivor of them and certain other persons mentioned in the trust, the principal of the fund was to be paid to the living issue of five nieces and nephews of the decedent. In this trust the decedent parted with all interest in the trust fund, the transfer was complete, and under it there could be no reversion to his estate.

Trust D, in the amount of $10,000, provided for payments of income to one Sarah B. Field, a school teacher in the City of Boston, and an old friend of the decedent, to whom he had previously made other gifts during her life, and upon her death the fund as it then existed was to revert to trust C set forth above. The beneficiary of trust D died during the lifetime of the decedent, and the trust fund was actually absorbed by trust C.

On February 13, 1924, the same date on which trusts A, B, C and D were carved out of his own estate, the decedent attempted to create a fifth trust, previously referred to as the Frank H. Beebe trust. The trust fund was to be derived from a legacy contained in the will of E. Pierson Beebe, who was then living, but under guardianship as an incompetent. Under the will made before he was declared insane he had left about one-half of his estate to the decedent, who attempted to create a trust therefrom reserving to himself the income for life. After his death the income was to be divided one-third to George Stanley Fiske, during his lifetime, and there-

after to his issue; one-third to his niece, Esther Fiske Hammond, during her lifetime, and thereafter to her issue; and one-third part to the issue of Esther Fiske Hammond, and on default of any such issue the income was to be added ratably amongst the other beneficiaries.

He further provided that upon the death of the last survivor of the decedent, his nephew George Stanley Fiske, his niece Esther Fiske Hammond, and the children of Esther Fiske Hammond, the principal of the estate as it then existed was to be paid over one-third to the then living issue of George Stanley Fiske, and two-thirds to the surviving issue of his niece, Esther Fiske Hammond, with the provision that in the event that there were no survivors of his niece or nephew, the principal was to be paid to "those persons who would have been entitled to receive the same according to the laws of the Commonwealth of Massachusetts then in force" as if it had been the absolute property of the decedent. This instrument contained no warranty or covenant, nor any statutory language operating as a warranty or covenant, and no consideration was paid by the grantees or the beneficiaries to the decedent. Whether or not this instrument was a valid trust by reason of the fact that the corpus disposed of in the trust instrument could not accrue to the decedent until after the death of E. Pierson Beebe is not now important, as after the death of E. Pierson Beebe the decedent ratified and confirmed the original trust instrument, making no change whatsoever in its provisions.

The confirmation and ratification was brought about by the fact that an attorney to whom the matter was submitted on the death of E. Pierson Beebe gave his opinion to the effect that the instrument of February 13, 1924, was not a valid trust instrument for reasons that he then stated. Acting on the advice of the attorney, a confirmation and ratification of the instrument was made. While this was being done the decedent caused the number of trustees to be changed from two, as written in the original instrument, to three, and caused himself to be elected one of the trustees. His purposes in having himself appointed a trustee were (1) to have the name of Beebe connected with the trust, and (2) because he wanted part of the commis-

sions. His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, and (2) to avoid the importunities of his family and his friends. All of the beneficiaries named in it were either those who on his death would be his heirs or their issue.

In 1926 and 1927, Welch, Brown and the decedent, as trustees, received the property to which the decedent became entitled under the will of E. Pierson Beebe. These three up to the time of the death of the decedent, and Welch and Brown since then, have been holding that property, and handling it under the terms of the instruments executed on February 13, 1924 and October 22, 1926. Copies of the instruments have been filed with the register of the probate court, and the trustees' accounts have been allowed from time to time. In all five trusts the trustees named were E. Sohier Welch and Sylvester Brown. In addition to acting as co-trustee under these trusts, Welch was co-trustee with the decedent of the estate of James M. Beebe, co-guardian of the estate of E. Pierson Beebe, guardian of C. Philip Beebe, and was also Frank H. Beebe's attorney. Sylvester Brown was a brother of George Brown who in turn was a partner of E. Sohier Welch.

CONCLUSIONS.

As to trusts A, B, C and D, I find and rule that the transfers made by the decedent were not testamentary in character, made in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of the decedent, and that the gross estate of the decedent should not include the value of those trusts. The decedent had for many years contributed to the beneficiaries, and his dominant motives in the creation of the trusts were to relieve himself from the burden of further caring for these individuals personally, to relieve himself from their importunities, and to guarantee a regular payment of income to the recipients. With the exception of trust A, the decedent parted with all interest in the funds, created no right of reversion, and the transfers were complete during his lifetime. The fact that the decedent was about to undergo an operation, with a resultant possible apprehension of death therefrom, may have provided the occasion for the creation of the trusts, but

can hardly be said to have been the dominant motive. I find that the dominent motives were as previously stated, and that they were more consistent with life than with death.

As to trust A, the trust having been executed during the lifetime of the decedent, and the decedent having accounted in his income tax return for the one-fifth share received from that trust, we need only consider the distribution of the remainder of that trust. Upon the termination of the trust, the other four-fifths of the trust fund were paid to the surviving beneficiaries, and as to this four-fifths interest, the donor parted with his entire interest, the transfer was complete, and this fund was not taxable as part of his estate.

There is nothing in the evidence to warrant my finding that in the creation of trusts A, B, C and D the decedent was actuated by the thoughts of death either imminent or remote.

As to the fifth or Frank H. Beebe trust, it would appear at first glance to be similar to a trust held valid in *Helvering* v. *City Bank Farmers Trust Company,* 296 U. S. 85, yet a close examination of the facts indicates that in the present case the decedent was actuated by a motive or an intent other than to make a present complete and outright gift. Decision as to taxability does not stand or fall on the type of instrument chosen to effect the transfer. It is brought within the statute if, from the context of the instrument and the facts surrounding it, it can be found that the purposes actuating the settlor were to make what was in effect a testamentary disposition. The statutory description embraces gifts inter vivos, despite the fact that they were fully executed, are irrevocable and indefeasible. *United States* v. *Wells,* 283 U. S. 102–116–117. The dominant purpose of the statute is to reach substitutes for testamentary dispositions, and thus to prevent the evasion of estate tax. *United States* v. *Wells* (*supra*).

The decedent was more than seventy years of age, had never married, and was the possessor in his own right of an independent fortune. He was a man who did not want to be bothered with business details, and the thought of succeeding to an estate of approximately another three million dollars was disconcerting because of the necessity of its management. He was apparently perfectly

willing to receive all of the income that might be drawn from the fund, but did not want to have the burden of its management. Indeed the prime purpose advanced by the plaintiffs for the creation of this trust was to relieve the decedent of the burdens of management. Such a purpose, while equally consistent with life or death, does not evince an intent to make a then present gift of the property to others.

The fact that he had himself appointed a trustee in order to take advantage of the commissions accruing to the trustees indicates his unwillingness to part during his life with any of the earnings of that estate directly or indirectly. To my mind this is not consistent with such an inter vivos gift as would in and of itself be exempt from the statute. The added reason that he had for the creation of the trust, and the only other reason advanced by the plaintiffs, was a desire to rid himself of the demands of friends and relatives. The creation of a trust, and the placing of title to the property in the trustees for these purposes, while equally consistent with life or death, is not persuasive of a desire to make a then present complete and outright gift. His motives could have been satisfied by the creation of a simple trust with the reservation of a power of testamentary disposition, or by the direct employment of a manager of the fund. What he really intended to do was to effect an arrangement that would relieve him of the burdens of his brother's estate, and rid him of the importunities of his friends and relatives.

His real purpose was not to establish a trust for others, or to make a then present transfer of the property to others. The trust instrument was merely the vehicle that he chose to accomplish his purposes of avoiding the burden of managing the estate as well as the importunities that would naturally follow the ownership of such an estate. Having accomplished his purposes, he took one step more, and in the same instrument made provisions for the distribution of this fund and its income to take effect after his death. There has been no reason advanced by the plaintiffs why the decedent took this added step, or why he chose an instrument that not only would accomplish the purposes that he had in mind, but which would tend to relieve his estate from the burden of estate taxes.

The plaintiff Welch testified, and I find as a fact, that Welch advised the decedent on financial matters and matters of investment, and that Welch's partner, one George Brown, advised the decedent on tax matters. Brown's testimony was not adducible at the trial, but Welch's testimony to the effect that neither he nor Brown ever discussed estate taxes with Beebe, although admitting the discussion of income taxes with Beebe, falls far from being convincing that the decedent did not receive advice on estate tax matters from Brown or others. That the decedent chose an instrument designed, not only to accomplish the purposes that he had in mind, but well designed to relieve his estate from estate taxes to the extent of that fund, and an instrument which disposed of that property after his death, strongly indicates a transfer that was not only testamentary in character, but intended to take effect in possession or enjoyment after his death. Having considered all of the evidence in the case with its logical inferences, I find that one of the major motives which induced the creation of this trust was to dispose of the estate received from his brother after having reserved to himself for life the entire income from that estate to the last possible demand.

I am of the opinion that the facts in this case are vastly different from these in the line of cases holding gifts inter vivos valid where a settlor has set aside out of his own property a trust fund for others, and has merely reserved the income from that fund to himself for life. In such cases, the dominant motive seems to be the setting up of a trust for others, and the incidental retention of the income for the life of the settlor. In the present case the dominant motive seems to be the retention of the income for the life of the settlor, and the incidental setting up of a trust to accomplish this purpose. There is lacking an intent or motive to make a then present gift, and it is only by virtue of the instrument used to accomplish the purposes of the decedent that there can be any claim of a right to dispose of the property after the death of the decedent as a mere incident to the trust.

It is at such subterfuge that Section 302 (c) of the Revenue Act of 1926 is aimed. No one could quarrel with the decedent insofar as he set up a trust fund, or took any other step to rid himself of

the burden of management of the fund, or to be rid of the importunities of his friends and relatives, but when he took the added step of disposing of this legacy as an incident to the vehicle that he had chosen to accomplish his purposes, I cannot believe that in taking that additional step he intended to do other than to make a testamentary disposition, or that in taking any of the steps, he intended to divest himself of the possession or enjoyment of the legacy, or transfer such possession or enjoyment to others at any time prior to his death.

I therefore rule that the transfer and trust involved in the Frank H. Beebe trust was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after the death of the testator.

In view of the foregoing it is unnecessary to consider either the retroactivity or the constitutionality of the amendments to Section 302 (c) of the Revenue Act of 1926 made in 1931 or 1932.

The Commissioner determined the net estate of the decedent to be $5,312,194.11. From this amount should be deducted the total value of trusts A, B, C and D as set up in such determination. After this deduction has been made the estate tax should then be computed in accordance with the schedule in force on the date of the decedent's death. Judgment may be entered for the plaintiffs in the amount of the tax that has been assessed and paid over and above that resulting figure, with interest at the rate of 6 percent per annum from the date or dates of overpayment, if any, with costs. The computation of the actual judgment may be determined by agreement of counsel, or, if unable to agree, upon application by either party, the question will further be considered by the court.

The defendant's motion for judgment is denied.

The plaintiffs' request for rulings of law are allowed insofar as they are consistent with this opinion, and are denied insofar as they are inconsistent. The defendant's requests for rulings of law are allowed insofar as they are consistent with this opinion, and are denied insofar as they are inconsistent.

PLAINTIFFS' BILL OF EXCEPTIONS AS AMENDED.

[Filed September 12. 1936; Allowed November 30, 1936.]

This is an action at law to recover amounts paid by the plaintiffs to the defendant on account of Federal estate tax on the estate of Frank H. Beebe, who died in November, 1932. The pleadings may be referred to, as may also the several exhibits introduced, marked "Plaintiffs' Exhibits 1" through "14" and "Defendant's Exhibits A" through "I", and the opinion of the court mentioned herein, all of which are hereby incorporated into and made part of this bill of exceptions by reference.

The case was tried on a written waiver of jury trial before Sweeney, J., on February 14, 25, 26, 27, 28, and July 20, 1936. On July 20 the court handed down its opinion.

MISS MAUD ROBINSON, a witness called for the plaintiffs, testified in substance as follows:

I was housekeeper for Mr. Frank Beebe about fourteen years from 1918 until he died and was in his household all of that time with few vacations. The household consisted of a housekeeper and eight servants in Boston and we went to Falmouth for the summers. I had all of my meals with Mr. Beebe and went out with him often in the daytime and was with him often in the evenings at home and sometimes went out with him. Mr. Beebe's health was very good from 1919 to 1924. He was in very good spirits and slept very well. He was very fond of the beautiful. He loved art, music, pictures and flowers. He went to concerts and the opera and had music at home. I often went to concerts with him. At Falmouth he was in the woods a great deal. He drove in the woods and had a flower garden in which he was much interested and spent much of his time planning. In the Spring he would get flower books and would go over those and pick out his seeds and talk with his gardener and plan the garden for the coming Summer. The estate at Falmouth consisted of about a thousand acres. There were drives and bridle paths through it and I frequently drove with Mr. Beebe. It was possible to drive on his place an hour or so without going over the same road. The

concerts which he went to were those of Kreisler, Rachmaninoff and the Symphonies. He sometimes went to concerts in the morning.

When he was at Falmouth he went to the stable in the morning, talked with his man, and often drove in the woods. In the afternoon he took a nap regularly, then went for a drive. While he was at Falmouth he went to town only occasionally for a day or two and he stayed at Falmouth until November, once as late as Thanksgiving time. When he was in Boston I always saw him at breakfast. He would go off in the morning around ten o'clock and almost always come home for lunch, take a nap in the afternoon, then would go and see pictures or to a concert. I have often heard him say that he did not like business, that it did not interest him much.

One afternoon in February, 1924, I came home and found him coming down the stairs with someone. That evening he told me it was a doctor and that he was going to have an operation. This was not more than a week before the operation occurred. He told me he thought he would go to Falmouth for two weeks and rest, but I advised him not to wait but to go immediately. He did go very soon. That was the first that I learned that there was to be an operation. Up to that time he seemed perfectly well and I had not noticed anything unusual about his health. He had had no illness prior to that time except colds. Prior to his operation he had been taking out his seed books, going over them and planning for the summer. While he was in the hospital, I went to see him nearly every day. After he returned he began to gain immediately, and the next three or four years after that he seemed to be very well. He had no serious illness so far as I know. His pursuits during that time were the same as before. He went to operas and concerts. He was always very much interested in the Boston Conservatory of Music and was a trustee of it.

During the period from 1919 to 1924, he went abroad several times. In 1923 he went with Mr. Carroll, a clergyman, who was ill while he was over there. After 1924 he continued his interest in his garden and music.

I think Mr. Beebe went abroad after 1924. His brother, E. Pier-

son Beebe, died in 1926, and Mr. Frank Beebe was abroad at the time.

I remained with Mr. Frank Beebe until the time of his death. Until shortly before his death I noticed no particular letting up of his activities or interests. The photograph which is Plaintiffs' Exhibit 1 was taken within a year of his death and is an excellent picture of him. I was there when the picture was taken in the sunken garden. There were about three gardens, some of them as large as this room.

Before Mr. Frank Beebe went to the hospital for his operation he seemed perfectly cheerful. There was nothing about his appearance, his conversation or his actions which indicated to me that he expected to die.

While he was at Falmouth he drove his horses and rode horseback a little.

Mr. Frank Beebe told me at one time that he himself never had any care of his property until his brother Pierson became incompetent. Mr. Frank Beebe told me that he did not like business, the financial part.

On *cross-examination* the witness MAUD ROBINSON testified substantially as follows:

I think Mr. Frank Beebe was in his 70's when he died. I suggested that he go to the hospital immediately instead of Falmouth before his operation because I think it is better for everybody not to wait. Mr. Beebe was bothered somewhat by colds from time to time but nothing serious. I do not think that he went to his office regularly. For a time perhaps he went frequently but later he did not go quite so much because he had someone who had taken charge. Mr. Beebe did not take people in his household into his confidence about matters generally. He was not a complaining man. When he came back from the hospital he gained very fast and seemed very well. Prior to his operation visits of doctors to the house were not more frequently than they ordinarily had been. I received a bequest of $15,000 under Mr. Beebe's will.

On *redirect examination* the witness MAUD ROBINSON testified substantially as follows:

The person who took charge of his office was Sylvester Brown. Mr. Beebe told me that he had taken charge and that he had relieved him a good deal. I think that Mr. Pierson Beebe went to a sanatarium about 1918.

Miss Mary V. A. Brown, his first cousin, was at the house of Mr. Beebe at the corner of Beacon and Dartmouth as a visitor in 1919 and 1920 and she spent some time at the Falmouth estate, coming every summer until she died.

Mr. Beebe never at any time spoke of death to me. He went regularly to Statler concerts in the morning. I thought that his recovery was complete after the operation. I did not notice any difference in his weight before the operation and after the operation.

Dr. WILLIAM C. QUINBY, a witness called for the plaintiffs, testified on *direct examination* substantially as follows:

I live in Brookline and I am a surgeon. I got my medical education at the Harvard Medical School and have been associated with the Massachusetts General Hospital, the New England Baptist Hospital, the Boston Dispensary, the Johns Hopkins Hospital, and I am now in charge of the urological surgery at the Peter Bent Brigham Hospital and clinical professor of urology at the Harvard Medical School. I was assistant in urology at Johns Hopkins. I have specialized in urological surgery, which is surgery of the urinary organs and the genital organs, and I am still practising that specialty.

In 1924 Mr. Frank Beebe came to me at Dr. Allen's suggestion, and I saw Mr. Beebe the following day at his house. He was admitted to the Peter Bent Brigham Hospital on February 29, 1924, and the operation was on March 5. In such instances the patient is put at rest for several days. After five days of rest with appropriate treatment, as his condition in other respects was entirely satisfactory, he was operated on on March 5 and the prostate removed. The prostate was enlarged and caused obstruction at the outlet of the bladder. There was nothing unusual in the performance of the operation. I considered him a very good risk for the operation and told him so. I did not observe any amount of apprehension on his part with respect to the operation. He was very cooperative, more

so than is generally the case for such an operation. He was perfectly placid and not alarmed in any way. He made a very good convalescence without any hitch at all. His recovery was splendid.

I have specialized in this branch of surgery since I went to Baltimore in 1914. The rate of mortality in these operations in general is approximately five to six percent. In my own experience it is definitely less than that, somewhere around two to two and one-half percent. I thought that Mr. Beebe was an excellent risk and I told him so. During his stay in the hospital his condition was satisfactory, not alarming in any way. His blood pressure was within low normal limits and so far as it went indicated an absence of myocarditis and of arteriosclerosis. His heart sounds were regular and of good quality, which indicated that the heart was normal. He was discharged on April 15, which indicated that the operation had been successful and that he had convalesced within the usual, average length of time. The results of the operation were excellent. I saw at this time no indication of heart disease or hardening of the arteries.

I have been associated with clinics in which 140 operations removing the prostate have been done without mortality. The patients ranged from 58 to 80.

I had never seen Mr. Beebe professionally until a few days before the operation. His condition had not become very painful or serious and it was a matter of election on his part whether to have the operation or not.

I told him that if he had his prostate removed he would get an excellent result, the dangers were not at all great and that the delay often was much more dangerous than to have the gland removed. He accepted the situation very placidly.

There was a secondary operation with reference to the bladder. This was due to a slight complication which had nothing to do with the patient. This was not the two-stage operation. His operation was a one-stage removal of the prostate.

I observed nothing about Mr. Beebe that indicated that he was expecting death as the result of the operation.

On *cross-examination* the witness Dr. WILLIAM C. QUINBY testified substantially as follows:

The first contact I had with Mr. Beebe was on February 25th when he came to my office. He told me that he had been suffering from difficult urination for about a year and a half, with increasing difficulty over that period of time, and that he had been advised by a surgeon in London he would probably have to have his prostate removed at some time.

A man is as old as his condition says. The numerical age of the patient has little to do with the matter. Mr. Beebe's condition was good from a surgical point of view so that in his case I did not consider that it was a very serious operation. Looked at from one point of view any surgical operation under general anesthesia is a serious operation. Prostatitis is a major operation. The fair, general average of mortality is approximately 6 percent, but if one selects the patient the mortality necessarily falls lower. The type of surgeon and the type of hospital equipment and care which the patient secures have something to do with the mortality rate. My mortality rate has been less than the mortality rate of surgeons with less fortunate surroundings. There has not been a substantial increase or advance in facilities and knowledge with respect to prostate operations since 1924. Most of the progress was before that date. There have been changes which have a tendency to reduce the mortality rate.

Myocarditis is inflammation of the muscles of the heart wall and a deterioration of the muscles of the heart.

The death certificate states that Mr. Beebe died in November, 1932, and that his death was due to chronic myocarditis and arteriosclerosis. The use of the word "chronic" means that the deterioration was not a sudden thing. The same is true in reference to arteriosclerosis. It is gradual. Before the operation in 1924, I examined Mr. Beebe's heart to see whether there was any deviation sufficiently marked to raise a question as to the functional value of the organ.

A general anesthesia was not needed for Mr. Beebe's second operation. Mr. Beebe did not tell me that he had been in delicate health. My recollection was that he had been furnished by his London surgeon with a catheter but Mr. Beebe said that he had never had to use it.

On *redirect examination* the witness Dr. WILLIAM C. QUINBY testified substantially as follows:

The retention of 7½ ounces of residual urine, if permanent there, would be serious but it would not be important if it was found on only one occasion. [At this point counsel for the defendant stated that he did not know whether there was more than one occasion on which there was such a retention.] From the fact that Mr. Beebe had little trouble after the experience in London, I should judge that his residual urine was not the same continuously and that it immediately diminished. My judgment that he needed an operation was based on the fact that he certainly was going to need one soon and certainly it was better to have it immediately and not to wait until the bladder was more and more handicapped, but his particular operation was a matter of election.

On *recross examination* the witness Dr. WILLIAM C. QUINBY testified substantially as follows:

"*Q.* Now just a moment more, Dr. Quinby. The reference to the cases mentioned, as to the retention of the 7½ ounces of residual urine, in a person who has prostate trouble, his difficulty, is it not, is with the retention of his urine? *A.* Is that in the form of a question?

Q. I am asking whether any patient who is suffering from prostate trouble suffers from retention of urine, does he not? *A.* Yes.

Q. So that if Mr. Beebe had prostate trouble for a period of two years or so, he would have during that period some amount of residual urine, would he not? *A.* Some amount, yes, but not necessarily as much as you say.

Q. No, I do not mean to intimate that. That is all, thank you.

The Court. Doctor, when they refer to 7½ ounces of residual urine, do I understand that is the amount of urine that is down in the bladder which cannot be expelled without mechanical means?

The Witness. Yes, that is right."

Dr. SEABURY W. ALLEN, a witness called by the plaintiffs, testified in substance as follows:.

I am a physician residing at 20 Charles River Square, Boston. I have been in general practice in Boston since my graduation from the Harvard Medical School in 1897. I knew Frank H. Beebe first about 1887 or 1888 and became his family physician. His health was good up to 1924, and I never heard of any serious illness up to the time of his operation. He went abroad in the summer of 1923, and on his return told me he had been examined by a surgeon or physician in London, who told him he probably would have to have an operation on his prostate some time. I verified that diagnosis and found that he had a prostate that was partially obstructed, enlarged.

He had more or less difficulty in passing urine. I prescribed the ordinary, simple treatment for that condition and temporized for the time being. An early operation was not indicated to me at that time, not until perhaps a week before the operation. Then I told him that he should be operated on to save a worse condition and if it were performed early he need have no particular worry about it. I told him that the prostate would have to be taken out and the obstruction relieved but that the worst thing for him probably would be the time he was confined to the hospital, for several weeks. I did not in any way indicate to him any possibility of a fatal outcome of the operation. He asked me if it would be a serious operation and I told him not if it were done by an expert and without delay. I saw him at the hospital before the operation. He was his usual self, cheerful and looking well. His physical condition was good. I thought that his chances of recovery were excellent.

I saw Mr. Frank Beebe on his return from abroad in 1926. His condition was perfectly good as I remember it.

After his operation he followed his usual routine, and his health was good until possibly two or three months before he died. In layman's terms he died of old age, but one is not allowed to give this as a cause of death on a death certificate. He died a senile death. There was no very definite diagnosis. There is always under those circumstances arteriosclerosis and a weakened heart, so I put that

down. I did not discover any weakness or defect in the heart until September of the year he died, 1932. I use the word "chronic" only as distinguished from acute. The arteriosclerosis did not come on immediately. I had not diagnosed the condition of myocarditis or arteriosclerosis in Mr. Beebe before September, 1932, and after the operation and down to the time of his death I do not recall any serious illness he had until his last illness. Through the years on many occasions Mr. Beebe often referred to his dislike of business. On a number of occasions he said he did not wish to be tied down to going to the office and being restricted from travelling and following outside pursuits. He spoke to me about being relieved of his business cares and expressed pleasure on a number of occasions at not having to go to his office. His whole attitude was he was glad to be rid of that kind of thing. He told me that he wished to be relieved of business cares in order that he might give attention to the things that gave him pleasure, especially music and flowers. This was his attitude over the years.

An affidavit of GEORGE GOODING, consisting of four pages, dated June 5, 1934, was introduced in evidence and marked "Plaintiffs' Exhibit 10", and was read into the record as follows:

"I, George Gooding of Falmouth, Massachusetts, on oath depose and say as follows:

"I started to work for Frank Huntington Beebe in 1894. My wife, Bertha Christine Carlson, started to work for him in 1900. We were married in 1906 and from then until 1931 (when we built our house on Sidders Pond Road, Falmouth, Massachusetts) we lived in the Beebe houses in Falmouth and Boston. From 1894 until 1919 I was coachman for Mr. Beebe and for other members of his family and from 1919 until Mr. Beebe's death I was caretaker at Highfield, a large estate owned by the trustees u/w of James M. Beebe consisting of about 900 acres, a large mansion house, stable and other outbuildings. My wife, for the first two years of her employment, served as laundress for Mr. Beebe and the other members of his family in Boston and Falmouth. She then became their cook and served in that capacity until we were married. From 1906 to 1919 she served

the family as accommodator and from 1919 until Mr. Beebe's death she served him again as cook at Highfield.

"During all those years of our association with Mr. Beebe I never knew him to have a serious illness until the winter of 1924 when he went to the hospital for an operation and after his recovery from that operation he was smart as a whip until the summer of 1931, when I noticed that he was failing slightly.

"In the spring of 1923 Mr. Beebe bought the Davis woodlot, so called, adjoining the Highfield property and which contained about fifteen acres. The bounds of that lot were not clear and Mr. Beebe refused to pay for it until bounds had been set by a surveyor. I walked over the lot with the surveyor and found the bounds and Mr. Beebe paid for the lot. During the summer of 1923 Mr. Beebe had a great deal of work done cleaning up the woods and the property near the railroad station. He had the fences repaired and many trees, shrubs and flowers planted at Highfield, including extensive work in the greenhouse. He had always been interested in flowers, shrubs and trees and you might say that in the summer of 1923 he was at the height of his glory in beautifying Highfield. Mr. Beebe owned himself several of the woodlots adjoining Highfield. but Highfield was owned to my knowledge by the James M. Beebe estate and most of the work which was done by Mr. Beebe in beautifying Highfield was done to the property owned by the James M. Beebe estate.

"During the summer and fall of 1923 Mr. Beebe appeared to be in extra good condition. He was always at the stable before eight o'clock in the morning, drove himself through the woods almost every morning and afternoon, and frequently helped the men in their work. He was very fond of chopping and trimming trees and always took an axe and a whole kit of pruning tools with him in the wagon. I almost always accompanied him in the wagon, and during the summer and fall of 1923 he was planning changes and improvements to the property for many years to come. He never said anything to indicate that he expected to die before the lapse of many years.

"Mr. Beebe, unless travelling, made a long summer season at Falmouth, usually staying there from June until the middle of Nov-

ember, and during the winter and early spring made visits to Falmouth every two or three weeks. On those occasions he usually stayed at Highfield two or three days. During the fall of 1923 and early winter of 1924 he paid Highfield his customary visits.

"Soon after I was married I purchased a house in Roxbury. My wife and I intended to live there but Mr. Beebe objected to our being so far away from his house. I rented the house for some years and then sold it, taking back a mortgage for part of the purchase price. In February 1924 I received notice from the City of Boston that the property was to be sold for taxes. I came to Boston several days before the end of February and did not know that Mr. Beebe was sick until I arrived at his office. I was shocked because when I had last seen him in Falmouth several weeks before he had appeared very well. I went to see him at his house and he told me that his lawyers would attend to my troubles and asked me to go back to Falmouth to attend to my work. He did not look like a sick man and said nothing to indicate that he was going to have an operation or was thinking of the possibility of death. I returned to Falmouth immediately and a day or two later heard for the first time that he had gone to the hospital for an operation."

E. Sohier Welch, a witness called by the plaintiffs, testified in substance as follows:

I am a graduate of Harvard College and Boston University Law School. I was admitted to the bar in 1911 and I am a lawyer but have practised as a trustee and executor of estates and a manager of property. My father, Francis C. Welch, and my grandfather were in the same sort of business. I first became acquainted with Mr. Frank Beebe about 1918. My father was trustee of the estate of James Beebe, the father of Frank. James M. Beebe was one of Boston's most noted merchants and owned a large amount of property in Boston. He left five children, of whom the eldest was E. Pierson Beebe, who became the head of the family. He had another son, J. Arthur Beebe, who had a son, C. Philip Beebe. The other children of James M. Beebe were the daughter Mrs. Fiske (who had two children, Esther Fiske Hammond and George S. Fiske) and one other unmarried daughter.

When I came into the office in 1911 my father and E. Pierson Beebe were serving as trustees of the estate of James M. Beebe. E. Pierson Beebe was the head of the family. He ran the family accounts, had the family office. The family investments were handled there. His brother Frank was not concerned in the family affairs. E. Pierson Beebe was an intelligent man of great ability and of very charitable purpose. The James M. Beebe estate consisted of some large pieces of real estate in Boston and a large amount of personal property. It must have been around some three million dollars or more. My father died on February 19, 1921, and I succeeded generally to his business as a trustee of almost all of his trusts. E. Pierson Beebe was then living but for some years he had been in failing health. J. Arthur Beebe had died. Mrs. Hammond and Mr. Fiske were alive. They were the daughter and son of the deceased sister of Mr. Frank Beebe. Mrs. Hammond was a widow who had six children. Fiske never married and had no children. Frank never married. There was a sister who had died unmarried some years before that.

I became trustee of the James M. Beebe estate with Frank Beebe. Pierson Beebe had been ill and was unable to continue as trustee. Frank Beebe and I were appointed. At the same time we were appointed guardians of E. Pierson Beebe, who was unable to act for himself. At that time the estate of E. Pierson Beebe was worth six or seven million dollars. I also became attorney for Frank H. Beebe and guardian of C. Philip Beebe, who was declared insane in 1919 or 1920. The estate of Philip Beebe was worth two or three million dollars and consisted of more personal property than real estate. Frank Beebe never married and Pierson Beebe never married.

E. Pierson Beebe's office was at 6 Beacon Street and Mr. Frank Beebe took that over. The books were kept in his office. The clerks were there and Frank Beebe came down for a certain amount of time, signed letters, etc. He had never had any business experience of any kind, and general business matters and the management of investments were arranged after consultation with me. He was a skilled musician and a member of many clubs. He had a great interest in horticulture and floriculture and attended all the concerts and

operas that came to Boston, and had concerts given in his home. He was a patron of musicians, a great traveller, going to Europe frequently, and a gentleman of leisure who thoroughly enjoyed life. While Mr. Pierson Beebe was competent, he ran Frank's affairs. Sylvester Brown came to the Beebe office, I think, in April 1921. I was running a large office of my own and it was impossible for me to devote as much time to his office as was required; and, as Frank Beebe was not experienced in business, I suggested to him that we should obtain some skilled person to take charge of the details of his office management and in general advise him and me. We selected Mr. Sylvester Brown and he proved adequate. Mr. Beebe was pleased with him, told me he was delighted to have Mr. Brown there, and was glad to have his help because he wanted to devote more time to his own pursuits, his gardening, his music and his travelling. Mr. Brown became more and more persona grata to Mr. Beebe, being not only in Mr. Beebe's confidence but in his affection.

A picture (which was introduced in evidence as Plaintiffs' Exhibit 11) is a very good picture of Mr. Beebe as he appeared in 1924 and 1925. Mr. Beebe was a man nearly six feet tall, well set-up, handsome, well dressed. He always had a flower in his buttonhole, beard neatly trimmed. He walked with a rapid step and was vigorous. In 1924, 1925 and 1926 his health was excellent. All over the years it was the same. I presume that I learned of his operation in 1924, but I did not know of it until either after the operation had taken place or he had just gone to the hospital. He never told me he was going to have an operation and never at any time said anything indicating that he was contemplating death. I could imagine no man who had a greater degree of vitality or interest in life or thought less about the future life and anything in any way connected with death. He was constantly busy, having people at his house, giving concerts, giving luncheons to musicians, attending concerts. In the winter time, he was preparing for the opera season and getting seats, going to Europe, preparing his plans for planting at his Falmouth estate, taking drives and taking pleasure in the finer things of life. The Falmouth estate belonged to the trust under the will of James M.

Beebe, but Mr. Beebe spent money on it as generously as if it were his own.

From 1920 to 1927 Mr. Frank Beebe and I were always discussing opera and symphonies, and Mr. Beebe was always extremely interested in the plans which I was making, what opera should be given and on what date. He was one of the larger guarantors. I was also trustee of the Symphony Orchestra for five years. Mr. Beebe was trustee of the Boston Conservatory of Music and was a very generous subscriber to their new building. He went to Europe nearly every year. He spoke French and German fairly fluently. He went abroad every year until the last two or three years of his life.

The estate at Falmouth was enormous, with gardens, barns, etc. It was a very large and luxurious place.

In 1922 or thereabouts, Mr. Beebe and I had a conversation about a real estate trust. The James M. Beebe estate owned a great deal of real estate, and it seemed wise to form a trust in order that it might be in the form of transferrable shares and that there might be continuity in management of the estate. Discussion of this matter continued for a period of nearly four years. Mr. Beebe was always dilatory about his business affairs because he hated to go to his office and attend to business. Letters would remain unanswered for days, sometimes weeks. The real estate trust finally was not put through. During the discussion about the real estate trust, there were discussions between Mr. Frank Beebe and me with respect to the formation of the trusts which are involved in this action. This was some time after 1922. Mr. Beebe stated that he desired to be relieved of the duties of the business. Mr. Beebe had found Mr. Brown satisfactory and had come to trust him in a large degree. He said that he felt so far as possible he would like to put the details of the business and the management of the affairs on Mr. Brown's shoulders.

He also wished to save the labor of handling the gifts he was making to various people. He had been giving money and other things to friends, relatives and employees; and these trusts were designed to relieve him of the burden and to make the payments regularly. I am referring to the trusts which we call the A, B, C and D trusts. I told him I thought it was an excellent idea because

it would enable the persons to receive their money at certain stated times and would relieve him of a considerable amount of income taxes which were taken directly off the peak of his own return. The beneficiaries of these trusts were persons whom he had been helping. He also said that there were certain people who were a little importuning in their requests for money, and that he felt it would relieve his mind somewhat if gifts were made regularly. In that connection there was discussion between me and Mr. Frank Beebe as to the amount which he would receive under Mr. Pierson Beebe's will. He and I knew the terms of Pierson's will, which had been drawn by my father. He knew that he would receive a half of Pierson's estate. He was averse to the idea of managing more property than he already had and said that he wished to be relieved of the responsibility and wished Sylvester Brown and me to manage it. This estate approached seven million dollars in value.

Mr. Frank Beebe said the first four trusts were designed to help persons who were importuning him. The purpose of the large trust was to relieve him of the burdens of management which would devolve upon his shoulders and to be able to say to members of his family who might ask him for money that the property was entirely in the hands of trustees. He also wished to concentrate the management of the Beebe property. Under E. Pierson Beebe's will, C. Philip Beebe obtained about half of Pierson's estate and I was guardian of C. Philip Beebe. Mr. Frank Beebe mentioned this. He did not wish to give up the income from Pierson Beebe's estate. I told him that he could accomplish his purposes by a trust deed, that this would put the property where he would be free of the management, could travel as he pleased and he could have the income himself. At this time I do not think he was consulting anybody except me. The matter of the formation of these trusts began as early as the summer of 1923, possibly as early as June 1923. During these discussions estate taxes were never mentioned and I do not think that Mr. Beebe knew about them.

Mr. Brown and I were appointed trustees under all of these trusts. They were executed on February 13, 1924, at my office. At that time Mr. Beebe was extraordinarily well and I had heard nothing

about any operation or the possibility of any operation. He said nothing either then or later indicating that he contemplated death.

Mr. Beebe went abroad in the summer of 1923 with Mr. Carroll, a clergyman. Mr. Beebe was a good Episcopalian, attended church regularly, did a great deal for the church at Falmouth and gave a good deal of money to the church.

Pierson Beebe died on August 8, 1926. Frank Beebe was then abroad. We cabled to him but he did not return for three or four weeks. After his return Mr. Beebe and I conferred in regard to the validity of the trust of Pierson Beebe's estate and we consulted Mr. Henry Meyer of Rackemann, Sawyer & Brewster. We had a meeting at which Mr. Meyer explained the situation to Mr. Beebe and told him that reaffirmation of the trust was deemed necessary. Mr. Beebe told Mr. Meyer that he wanted to reaffirm the deed and asked him to draw the necessary papers. That conference was held at the Union Safe Deposit Vaults, where the securities of the family were kept. Mr. Beebe was in excellent condition. He expressed a desire then to be appointed trustee so that the Beebe name would be associated with the trust and he said that he wanted part of the commissions.

At that time I had not observed anything indicating that he was contemplating death. I saw him frequently thereafter up to the time of his death. From then to the time of his death, he had less to do with his office, but he devoted himself with an equal amount of assiduity to his own pursuits, such as gardening, music, etc. Mr. Brown and I did everything in connection with the management of the Pierson Beebe property and also the part of Pierson's estate which came to Philip Beebe, except to sign letters. Mr. Brown was the acting manager and I was consulted in all important questions. Mr. Beebe came into the office occasionally and signed some mail and was consulted before we made changes of investments, but I think without exception he accepted our judgment and continued to spend all of his summer and autumn at Falmouth.

In 1924, after we had made various trust deeds, my partner, Mr. Brown, who had drawn his will pointed out that the will ought to be changed so as not to conflict with the trust deed and that was done.

The property of Mr. Pierson Beebe came into the hands of Mr. Brown, Mr. Frank Beebe and me as trustees; and we administered it and submitted our accounts to the probate court and they were duly allowed. The estate of E. Pierson Beebe consisted of a considerable amount of real estate and perhaps 200 different items of stocks and bonds. It required all of Mr. Brown's time to handle that and the other affairs of Mr. Beebe's office.

At the meeting in the Union Safe Deposit Vaults in 1926, Frank Beebe stated that he wished Mr. Brown and me to manage the property but he wished to be a trustee himself. He stated that he expected to devote no time to it.

On *cross-examination* the witness E. SOHIER WELCH testified substantially as follows:

During the time I knew Mr. Frank Beebe he went to Europe frequently. His activities, his own hobbies, were interrupted for a while by his accession to power in the office which became a burden to him. Mr. Sylvester Brown was appointed in 1921 as manager of the office and slowly took over the burdens from Mr. Beebe.

The real estate trust was abandoned in 1926 because the guardian *ad litem* felt that, under a recent decision covering income taxes (*Hecht* v. *Malley*), such a trust would increase rather than diminish income. I know nothing about taxes. My partner attends to them.

Frank Beebe was not a remainderman under the will of James M. Beebe. He was simply a life tenant. He had a one-fifth life interest. This figure may not be accurate.

Mr. Frank Beebe did not return from abroad on the occasion of Pierson Beebe's death because he was enjoying himself and knew that Sylvester Brown and I were there to attend to matters.

The trustees of the trust of Pierson's property created by Frank came into possession of the property in 1927 and 1928. Mr. Beebe was consulted on practically all important matters concerning the trust. I did not advise him to make himself a trustee.

Mr. Beebe was not prompt in cutting coupons and in the management of affairs. He was usually on time for appointments but did not sign papers promptly. Frank Beebe and I were co-guardians of E. Pierson Beebe. We petitioned the court for the guardianship of

Pierson on the ground of mental incompetency. I think that Pierson Beebe was senile. Frank Beebe asked to be named guardian of his own free will and I advised him to apply. Frank Beebe liked income and squeezed hard to get every cent that he could.

"*Q.* Do you remember, Mr. Welch, making the following statement on June 28, 1934, in the office of the revenue agent here at Boston, where you, Mr. Sylvester Brown, Mr. George W. Brown—

Q. —George E. Brown, Mr. William L. Payson, Mr. Henry Hixon Meyer, Mr. G. E. Rausch, chief estate tax officer, Mr. John B. Medore, internal revenue agent, were present—the statement that I make reference to is this— . . .

Q. In answer to the question propounded—well, I will read the question propounded by Mr. Meyer:

'*Q.* Was he interested also in reducing the burdens of managing the property?'

And your answer that I am asking if you remember is:

'Well, I suppose our major reasons were two, and I put the minor reason first, because it came to my mind. I think our office made up his income tax returns anyway and I was familiar with his income taxes, and the amount he paid, and they were becoming exceedingly heavy, and it therefore seemed essential to reduce those in any possible way and I pointed out to him that, as long as he was making substantial gifts every year to various friends and members of his family, there was no reason in the world why he shouldn't make a trust and thus through that means avoid the taxes. This idea appealed to him considerably and it was certainly one of the contributing influences—one of the major contributing influences in the formation of the trust.'

Do you remember that statement? *A.* It sounds like me.

Mr. Hall. You are not going to pause there, are you? Aren't you going to give the complete answer?

Mr. Zimmerman. I am sorry. I will read it further. I thought the question started after that.

'Also as Mr. Sylvester Brown became more and more familiar

with the management of the Beebe office, Mr. Beebe leaned more and more upon him and wanted him to take more and more of the burden off his shoulders, and by the formation of the trust this was accomplished.'

The Witness. Yes, sir.

Q. In that statement, Mr. Welch, you refer to your familiarity with the income taxes and the amounts paid, but that, of course, was through the advice of your partner in turn to you? *A.* I am familiar with the burdens of taxation, but not with the administration.

Q. What do you mean, may I ask you, with reference to the burdens of taxation? *A.* I mean that we have to pay taxes.

Q. Do you advise your clients in your relation with them to— *A.* To avoid all taxes possible that they can do legally, when I know about it.

Q. There is certainly nothing wrong with that advice. *A.* I think it is very good advice.

Q. Do you remember this statement made at the same time, Mr. Welch, and here, Mr. Hall, I am referring to the first question in the entirety appearing on page 18 of the transcript. The question was:

'In other words, he felt that if he were added as a trustee the commission would be split three ways instead of two?'

Your answer being, 'Absolutely'.

A. It sounds quite natural.

Q. The next question being:

'Therefore, that he wouldn't lose quite as much?'

And your answer:

'He was every year squeezing harder and harder to get every cent he could.'

A. That is also correct. He liked income, like us all.

Q. The next question:

'Do you recall whether or not at that conference he made any statement that he formed the trust in order to be relieved from the burden of running the property?'

And your answer:

'Well, that was one of the chief reasons—that and taxation.'

A. That is correct. The taxation referred to, of course, the income tax.

Q. In 1926 Mr. Sylvester Brown was even more active in the management of the Beebe office than he had been in 1924? *A.* Yes. You understand the question of taxation refers only to A, B, C and D. It has no relation to what we call the big trust, the Frank Beebe Trust.

Q. Why is that? *A.* Because we only saved taxes on the A, B, C and D—the income taxes.

Q. Do you know that the position of the plaintiffs in this case is that the property conveyed under the big trust is not the subject matter of estate taxes? *A.* Who are the plaintiffs here?

Q. The plaintiffs here are the executors of the will of Frank Beebe. *A.* Oh, yes.

Q. But you do draw a distinction, do you, between Mr. Beebe's attitude and your own with reference to income taxes and estate taxes? *A.* Yes, no connection between the two at all.

Q. In other words, I am to understand that Mr. Beebe had the benefit of your advice and the expert advice of your partner with reference to all income tax matters affecting these trusts, but that so far as estate tax matters were concerned, Mr. Beebe never heard of them, I think you said, and you gave no advice whatsoever to him? *A.* On the A, B, C and D trusts there was a saving of income taxes by making them. On the question of estate taxes, so far as I can remember, there was no mention of them at any time during the process of drawing the papers or advising him.

Q. Don't you ordinarily advise your clients with respect to estate taxes, Mr. Welch? *A.* My partner, George Brown, is more apt to do that.

Q. Well, did he advise Mr. Beebe with reference to estate taxes? *A.* No.

Q. To your knowledge? *A.* Not that I know, sir. I don't think we were concerned in estate taxes in any way in this par-

ticular case. That was not the reason for making the trust deed."

The plaintiffs here are the executors of the will of Frank H. Beebe. There was a saving of income taxes by making the A, B, C and D trusts but no mention of estate taxes was ever made in connection with any of the trusts so far as I can remember. My partner is more apt to advise clients with respect to estate taxes than I am but he did not advise Mr. Beebe.

I am trustee of a great many trusts, but do not give advice to any of my clients as to estate taxes. My partner, George E. Brown, the brother of Sylvester Brown, does give such advice. Most of the trusts of which I am trustee are testamentary trusts, but there are a few living trusts although not many. I do not recall any estate tax in connection with these trusts, nor any litigation concerning the estate taxes.

Frank Beebe was an executor under the will of E. Pierson Beebe and as such was charged with the duty of filing an estate tax return.

"*Q.* Did you explain to Mr. Frank Beebe that he was filing an estate tax return? *A.* No, sir. I never saw him in connection with it.

Q. Do you know whether your associate explained to him? *A.* No, sir. I presume Mr. Sylvester Brown did."

I do not know when the first trust draft was discussed. It may have been in the spring of 1923 or in the summer or autumn. The general idea of a trust was discussed a long time before it was reduced to final form. We may have had a dozen drafts, but I have no memory as to the details of the various drafts.

"*Q.* Was the paper given to you, the draft of the trust given to you for your approval? *A.* I presume so. I do not remember.

Q. You do not remember? *A.* No. I remember very little that happened 10 years ago.

Q. Well, you remember— *A.* In details.

Q. You remember the details? *A.* I would not say I remember details 10 years ago.

Q. On this occasion when a client signs a transferring trust involving $3,700,000 you would consider a detail? *A.* Well, I must say yes, signing a deed does not particularly thrill me.

Q. Well, at any rate, you believe you read the trust? *A.* Oh, undoubtedly I read it before it was signed." . . .

"*Q.* To go back to my original question, Mr. Welch, if it were the main motive of Mr. Beebe, as you say, to merely unburden himself from the management of properties here, wouldn't that have been just as well accomplished by a trust drawn to trustees for his life, giving them the power to manage that trust without any specification of those persons who were to take after his death, such as the persons I have read from the trust instrument? *A.* Just exactly as easy.

Q. It would have amounted to the same thing, would it not? *A.* If he had wanted to.

Q. Then we must ascribe, must we not, to some other motive the naming of the specific persons? *A.* No, I don't think so.

Q. In your relation and in your discussion with Mr. Beebe over this trust what impression did you get or what do you know or what did you learn concerning the reason for Mr. Beebe's naming these specific individuals? *A.* He had to name somebody; they were the people who would be most in need of money at some future time. C. Philip Beebe, one of his heirs at law, if you want to put it on that basis, was very wealthy. E. Pierson Beebe, his brother, was even more wealthy than he was, and George S. Fiske, as far as I know, was also wealthy. The logical remaindermen would naturally be the children of his sister.

Q. I thought you said, though, that the same result, so far as the unburdenment of the management, could be accomplished by merely a trust to— *A.* They could; they could.

Q. You said he had to leave it to somebody. He didn't have to leave it in this trust instrument to somebody? *A.* Not necessarily.

Q. He could have left it in his will? *A.* Certainly.

Q. And they would have received his money on his death, if

they were in need of it? *A.* If there were any will, yes. A man can do many things under a trust deed. It happened to be his wish to do this in this way."

I advised Mr. Beebe with reference to his wills. The will was changed to avoid some duplication of gifts on account of property conveyed in the trust deed.

The persons who would have been Mr. Frank Beebe's heirs in 1924 were his brother, E. Pierson Beebe, his niece, Mrs. Hammond, his nephew, George Fiske, and his nephew, C. Philip Beebe. E. Pierson Beebe and, as far as I know, George S. Fiske were wealthy. The reason why Mr. Beebe named the persons he did as beneficiaries under the trust of E. Pierson Beebe's property was because they were the younger members of the family who would be most in need of funds eventually. I did not think about the effect which these trusts would have on the will. After the trust instruments were practically ready for signature it came to our minds that we shouldn't leave the will in that form.

I never heard of Mr. Beebe's operation before the execution of the trust on February 13, 1924. My associate, Mr. George E. Brown, wouldn't know any more than I would know. I had nothing to do with the income tax returns and don't know where they were made out. Mr. Sylvester Brown would know.

I can't remember whether at the time there was any discussion of the income tax return due March 15. I do not remember who prepared the income tax returns. I thought that my office prepared them, but I do not remember, and have been told since that we did not. I think the reason for Mr. Beebe's being added as a trustee was that he wanted part of the commission, also he wanted his name connected with the trust.

Mr. Beebe never gave me any idea that he feared that he might become mentally incompetent. Mr. George E. Brown is at present in Bermuda.

The amount of E. Pierson Beebe's property that was conveyed to the big trust was approximately equal to that owned by Frank Beebe himself then. Mr. Frank Beebe had made gifts, both large and

small. He had given $100,000 to Esther Fiske Hammond. I know nothing about the circumstances surrounding that gift. I do not know why Mr. Beebe did not name himself a trustee of the big trust on February 13, 1924. He was a trustee when that trust was confirmed because he asked to be,

Mr. Beebe's gifts varied from a suit of clothes to one hundred thousand dollars, but, as far as I know, there was only one gift of one hundred thousand dollars, the one to Esther Fiske Hammond.

On *redirect examination* the witness E. SOHIER WELCH testified substantially as follows:

I think that Mr. Beebe inherited about a million dollars and that under the management of his brother, E. Pierson Beebe, his property increased in value to two or three million dollars. E. Pierson was born July 4, 1843, and Frank was born June 5, 1853.

HENRY HIXON MEYER, a witness called for the plaintiffs, testified in substance as follows:

I graduated from Harvard Law School in 1919, was admitted to the bar in Massachusetts in 1920, and since then have specialized in real estate and probate law, connected with the firm of Rackemann, Sawyer & Brewster. In 1926 Mr. E. Sohier Welch sent me a copy of the instrument known as the "big trust", with a request that I examine it and advise the other trustee named in it, Mr. Brown, as to the validity of the trust. I understood Mr. Pierson Beebe had died shortly before. I did not know him and had only seen Frank Beebe a few times. I examined the trust instrument and advised Mr. Welch, in the opinion of our firm, it was not a valid transfer. This was my opinion because in 1924 Pierson Beebe was living and there was no way in which anyone could tell whether Frank Beebe would ever inherit any of the property from his brother.

The transfer attempted a present transfer without any covenants of warranty, so that as we saw it there was no way in which the trust could operate. I so advised Mr. Welch and Mr. Brown, and wrote a letter to that effect in September, 1926, and advised that it should be confirmed. Several days later Mr. Welch asked me to attend a meeting with Mr. Beebe at the Union Safe Deposit Vaults

and explain the situation to Mr. Beebe. Accordingly I met with him and one or two other persons, and I explained to Mr. Beebe why we thought the trust instrument was not a valid transfer, and Mr. Beebe asked me what I advised him to do. I told him that I advised him the instrument should be confirmed if he wished to have it take effect. His reply was he certainly wished to have it take effect because he wished to be relieved of the burdens of the management of this property. He told me to draw an instrument to confirm the transfer and asked me whether or not we could arrange it for him to be appointed a trustee.

He said he wished to be appointed a trustee because it was Beebe property and he would like to have the Beebe name connected with it. I told him how this might be accomplished by the resignation of one of the trustees named in the instrument and the appointment of that same person and Mr. Frank Beebe as trustees to fill the vacancy, making three trustees instead of two. Mr. Beebe stated that he wished Mr. Welch and Mr. Brown, who had been handling this property as guardians of E. Pierson Beebe, to continue that management. He stated that he himself had no intention of taking an active part in the handling of the trust affairs. I drafted the confirmation so called which was in the form of a deed and also the resignation of Sylvester Brown and the appointment of Frank Beebe and Sylvester Brown as trustees. I also attended to recording these papers in the Registry of Deeds. I was not present when the confirmation was executed. At the time of the meeting in the Safe Deposit Vault Mr. Frank Beebe was alert, active, had all the appearance of being an exceedingly healthy man.

I have made a comparison of the wills of 1922 and 1924. Both wills contained a vast number of legacies and there are numerous changes in these legacies. There were reductions in some and additions in other pecuniary legacies. Legacies to the Conservatory of Music, Symphony Orchestra, Industrial School, South End Music School and Harvard College were all reduced from $25,000 to $10,000. The Animal Rescue League was given a legacy in the 1924 will, but not in the first will and there were numerous other changes.

In both wills there was a trust of $100,000 to establish what was to be known as the Frank Huntington Beebe Fund for Musicians.

When I saw Mr. Beebe I observed nothing indicating any apprehension of death on his part. The subject of estate taxes was never mentioned. It is still my opinion that the conveyance in 1924 was invalid.

Upon *cross-examination* the witness HENRY HIXON MEYER testified substantially as follows:

The will dated March 18, 1932, was the one which was finally allowed, with a codicil.

The will of E. Pierson Beebe which was probated contained this clause:

> "*Sixth.* All the rest, residue and remainder of my estate, real and personal, of which I shall die seized and possessed, and to which I shall be in any way entitled at the time of my decease, and over which I now or may then have any power of appointment, I give, devise and bequeath to my sister, Emily B. Beebe and my brothers J. Arthur Beebe and Frank H. Beebe or such of them as shall be living at my death and the issue then living of any of them deceased, and if more than one in equal shares according to the stocks."

The date of this will was July 21, 1911.

[At this point counsel stipulated that in 1924 and at all times thereafter there was no issue of Emily B. Beebe; she had died; and the only issue of J. Arthur Beebe, who had died, was C. Philip Beebe.

[At this point it was also stipulated that the codicil to the will of E. Pierson Beebe dated July 15, 1925, contained the following clause:]

> "I revoke paragraph eighth of my said Will and in place thereof I provide as follows. I appoint my said brother Frank H. Beebe, and E. Sohier Welch, of Weston, in the County of Middlesex, and Sylvester Brown of Braintree in the County of Norfolk, and all in said Commonwealth of Massachusetts, executors or executor of my said Will, and I request that they and each of them be severally exempt from giving any surety or

sureties on their or his official bond, as such executors or executor. I ratify and confirm my said Will in all respects saving only in these wherein it is ordered [altered] by this codicil."

To the suggestion that despite the absence of a warranty provision in the deed of the "big trust", Mr. Beebe, the grantor, might be estopped from denying lack of title as the date of execution, I think the answer is there was no consideration for this conveyance and therefore estoppel could not work.

I am one of the attorneys representing the plaintiffs in this action, represented the plaintiffs in the settlement of the estate and the conduct of the tax matters, and assisted in the preparation of this case for trial.

Upon *redirect examination* the witness HENRY HIXON MEYER testified in substance as follows:

As I understand estoppel, there has got to be some action taken by someone in reliance upon the deed of trust which would be the basis for estoppel running against the grantor.

On *recross examination* the witness HENRY HIXON MEYER testified substantially as follows:

There was no equitable right transferred by the instrument of February 13, 1924, to the trustees or to the beneficiaries which under the law of Massachusetts could be specifically enforced in courts of equity.

Dr. FLETCHER H. COLBY, a witness called for the plaintiffs, testified in substance as follows:

I am a surgeon at 205 Beacon Street, Boston. I obtained a degree from the Harvard Medical School in 1918 and am a graduate of the Boston City Hospital, Peter Bent Brigham Hospital, and Massachusetts General Hospital. I have specialized in genito-urinary surgery.

In 1924 I was resident surgeon at the Peter Bent Brigham Hospital and, for that hospital, made a preliminary examination of Frank Huntington Beebe on February 29, 1924. Mr. Beebe was admitted to the hospital on that day. He gave me his history. He said that

he had no occupation. His family history was not particularly important as far as this case was concerned. He complained of increasing difficulty in urination. He said he at times had rather delicate health, but, except for intestinal trouble twenty-five years ago, he had never had any serious sickness. At that time he was told he had inflammation of the bowels, possibly appendicitis. He had frequent sore throats when a young man but none recently. He had never had any operations. The past history was otherwise entirely negative.

I also made an examination, which I recorded in detail. Among other things, I learned that there had been no trouble in the genito-urinary tract up to the present illness, but for some two or three years, at least, there had been some difficulty in passing his urine. This had very gradually increased. Seven to eight months ago he saw a doctor in London who catheterized him and told him he had seven and one-half ounces of residual urine. He had been provided with catheters to use himself should occasion arise, but he had never had to use them. During the next two months he had very little trouble, but about Christmas time he began to have further trouble in passing his urine, having to strain and frequently passing small amounts. At this time, during the course of physical examination, he was catheterized and was told that further investigation was necessary. He had never had complete retention of urine. He had not had marked frequency and had had no hematuria, and there had been no bleeding at any time.

The physical examination showed that he was a well developed and well nourished adult man, resting comfortably in bed in no apparent distress. The heart was entirely normal in so far as could be told by examination. The blood pressure was entirely within normal limits. If there was any arteriosclerosis, it was not significant. The prostate was symmetrically enlarged, elastic, not nodular and not fixed. My conclusion was that he was an individual in a rather unusually good physical condition,—the only abnormality being the enlargement of the prostate gland. I summarized the whole situation as follows: "A man of seventy-one years who has always been well and whose complaint at present is increasing diffi-

culty in emptying his bladder. The urinary symptoms have not been particularly marked, frequency and nocturia being slight. He has never had complete urinary retention. General physical examination is excellent. Impression: Benign hypertrophy of the prostate gland." That is non-malignant enlargement of the prostate.

I was an attendant at the operation and during his convalescence. He stood the operation exceedingly well, better than the average man of seventy. I saw him two or three times after he got out of the hospital.

I never saw anything in my observations that indicated any apprehension of death on his part. There was a perfect surgical result from the operation.

On *cross-examination* the witness Dr. FLETCHER H. COLBY testified substantially as follows:

Mr. Beebe's urine contained pus. This was due to the enlarged prostate gland, with the presence of bacteria in the residual urine. On the second operation he was given ether, which is a general anesthetic. The cause of the second operation was a very unusual thing, which I have never seen occur before,—the mucous membrane of the bladder grew across the opening. A very small incision was made on the second operation.

"*Q.* Dr. Colby, from your experience would you say that an operation such as this—I am speaking of the first operation now—on a man of Mr. Beebe's age, with consideration of the excellent condition he was in—would you term that a major operation? *A.* Yes, sir.

Q. Would you term it a serious operation? *A.* I don't know what your definition of 'serious' is. Serious from what point of view?

Q. Is the operation possible of resulting in death? *A.* Any operation.

Q. Particularly an operation under general anesthetic? *A.* It carries the added risk of ether or the general anesthetic.

Q. Is there always a danger of shock present in a major operation to a man 70 years of age or more? *A.* Yes, sir."

On *redirect examination* the witness Dr. FLETCHER H. COLBY testified in substance as follows:

Mr. Beebe was in rather unusually good general physical condition. His condition generally had not suffered from his prostatic condition to any appreciable extent. He was a most excellent risk, and I expected him to come through the operation without any difficulty at all. My own experience of mortality in these operations is that it is considerably less than six percent. The general mortalities, which are taken, consider all operations. Mr. Beebe was definitely a good risk.

The fact that, at the time Mr. Beebe was examined by the London physician, he was suffering from a cold could account for the retention of urine at that time. The things which I found were all consistent with the enlarged prostate and were all typical of that. I discovered nothing unusual.

On *recross examination* the witness Dr. FLETCHER H. COLBY testified substantially as follows:

There is not considerable danger of pneumonia resulting from an operation of that sort to a man of seventy, but it does occur occasionally.

There has been one very definite improvement in certain types of prostatic difficulty since 1924, termed prostatic resection. My mortality figures include operations up to a short time ago comprising this new method, but in Boston we have not done many of this particular type of operation.

On *redirect examination* the witness Dr. FLETCHER H. COLBY testified substantially as follows:

The second operation was due to an unusual degree of healing capacity on the part of Mr. Beebe.

[At this point counsel for the plaintiffs read into the record the following letters from Frank Huntington Beebe:]

Letter of September 14, 1923, to Pierson Beebe from Frank Beebe:

"Dear Pierson: Mr. Brown and I yesterday made a thorough visit to Mrs. Samuel D. Warren's house at 261 Marlborough Street. The rooms are large and well furnished, with open fireplaces, and a great deal of sun, and the house has the great advantage of a lavatory on the first floor, and a lift to reach the master's chambers on the third floor. On the second floor

are two large parlors, the back one might be called a music room, where there is already a grand piano. There are plenty of bathrooms, plenty of maid servants' rooms, and the house is very fully furnished with rugs, books, lights, and some china if we want it. We are very favorably impressed with the house, and doubt if any other house in a convenient position could be found that would contain so many desirable features as this house does, for your comfort. When Mr. Brown heard of the house from Mr. Boardman, it had only been in the market a few hours, and it seemed to us so desirable, that we thought it was wise to act promptly, and we have therefore made an offer to rent the house for the winter. The offer has been accepted.

I expect to go back to Falmouth today. I hope this finds you well. Yours affectionately,

FRANK."

Letter of October 3, 1923, addressed to the Rev. Marcus H. Carroll:

"Dear Marcus: I have to thank you very much for your letter of September 24th, which I have hoped to answer each day for a number of days, but the sun has risen and set without my finding the right moment.

I am happy to say that I have been very well, so well that I have had a good deal to do. I am very glad to hear that Mr. Brennan is able to give you an afternoon ticket for the Symphony, so I am now enclosing my check for $45. for a seat, and $55. for the expense of coming, and going, etc.

I do hope that you will be able to bring Mrs. Carroll to see the 'Chauve-Souri' at the Shubert, which is really worth seeing, and much out of the ordinary, with the Russian coloring and costumes, and the pretty grouping.

I judge from your letter that you are really very well now, and having very little trouble with your interiors. I hope your better state may become a permanency. With my kind remembrances to Mrs. Carroll, and Miss Letitia, I am

Yours affectionately,

FRANK H. BEEBE."

Letter of November 14, 1923:

"Boston Opera House, Huntington Avenue, Boston, Mass.

Dear Sirs: I would like the refusal of four tickets for the Kreisler concert on March 3rd, from the second to the sixth row, left centre aisle preferred, with one an end seat. If you cannot give me seats on the left side, I will take them on the right side orchestra. Yours very truly,

FRANK H. BEEBE."

Letter of November 27, 1923:

"Symphony Hall, Huntington Avenue, Boston.

Dear Sirs: I enclose herewith my check for $22. for the tickets you are holding for me as follows:

Freida Hempel	4 tickets
Roland Hayes	4 "

Please send these to me in the enclosed stamped envelope, and oblige, Yours very truly,

FRANK H. BEEBE."

Letter of December 7, 1923, addressed to Mr. Sharp:

"Rev. James Clement Sharp, Falmouth, Mass.

My dear Mr. Sharp: I have just read your letter of December 6th in regard to the money for the apportionment of 1924. I think your suggestion of having an assistant secretary to look after the detail of the pledge system is a very good one, and it would be very agreeable to me if you could have that looked after in Falmouth, and then send the results each week, or when convenient, to me in Boston. I wish to acknowledge with thanks now the receipt of $155. this morning, for which I am now enclosing receipt. I will write you a little later in regard to my being present at the vestry meeting.

The annual parish meeting will be coming before very long, the second Tuesday in January, and if you know of anything special that we have to consider, I should be glad to know of it now, or of any special articles that are to go into the warrant.

I am pleased to hear that the Eucharistic lights were used on Sunday.

Will you kindly let me know at your earliest convenience how many one-half pound candy boxes will be needed for the Sunday School children, and the Sunday School teachers, and any other outside parties that we should like to remember. I have ordered the boxes but do not know exactly the number that we should like. I hope that you and Mrs. Sharp are keeping very well.

Yours sincerely,

FRANK H. BEEBE."

Letter of December 18, 1923, to Mr. Sharp:

"My dear Mr. Sharp: Thank you for your note of December 10th which has just come to me, telling me that there are seventy-five people to be remembered with boxes of candy. I am sending receipt for $5 from Mrs. Emma S. Davis.

I want to suggest that for Xmas day, would it not work very well if you had a morning service, say at nine o'clock, and then you and Mrs. Sharp could take the train and spend the rest of the day with your mother. I think one service at St. Barnabas would seem to suffice for the day, and I think that you should have the rest of the day with your mother, if you so desire.

The days between this and Xmas are few and full, and I am not sure that I can conveniently join you at a vestry meeting, so perhaps in the uncertainty of things, for I really have many things of importance to look after, it would be well for you to arrange for the vestry meeting at a time convenient for the Falmouth people, and if it so happens that I can come, I can let you know.

I am enclosing checks from my brother and myself for the Xmas festival, and am reminding Mr. Fiske, hoping that he will do the same. Will there be any more collections to come in from St. Barnabas for the 1923 Church Call quota. If so, I should be glad to know at a somewhat early date, as we have to know how much has to be made up to fill the quota before the end of December, and also, please let me know as soon as convenient, in regard to the warrant for the annual parish meeting.

The beautiful weather continues, and everybody should be well. Yours sincerely,

FRANK H. BEEBE.

Rev. James Clement Sharp, The Rectory, Falmouth, Mass."

Letter of December 18, 1923, addressed to Symphony Hall:

"Dear Sirs: Please reserve for me two seats for Friday evenings for the Burton Holmes lectures in row K or L on the right side of the right aisle, with an end seat.

Kindly advise my office the price of tickets, and I will send check. Yours very truly,

FRANK H. BEEBE."

Letter of December 18, 1923, addressed to Louis H. Mudgett:

"I write to ask you to reserve for me seats in the second or third row from the stage, left side of left aisle, with an end seat. I cannot say for which operas I would like tickets until I know what the operas are on the different nights. Can you send me the prospectus? Yours very truly,

FRANK H. BEEBE."

Letter of December 18, 1923, to Edward Farnham Greene, Boston-Chicago Opera Association:

"Dear Mr. Greene: I write to say that I shall be pleased to become a member of your Board of Guarantors for the 1924 season of the Boston-Chicago Opera Co. guaranteeing $500 in my name. With best wishes, I am,

Very truly yours,

FRANK H. BEEBE."

Letter of December 27, 1923, to Symphony Hall:

"I enclose herewith my check for $13.20 for two course tickets for the Burton Holmes lectures. Kindly send the tickets to me, and thus much oblige, Yours very truly,

FRANK H. BEEBE."

Letter of December 29, 1923, to Edward Farnham Greene:

"Dear Mr. Greene: Thanks for your letter calling my attention to my guarantee pledging $1,000 to the Boston-Chicago

Opera Association for the season of 1924, which it seems I made last March, and which I overlooked when I sent you a note lately pledging $500. Please consider the $500 pledge withdrawn in consequence of the larger pledge. I am,

Yours faithfully,

FRANK H. BEEBE."

Letter of January 4, 1924, addressed to "My dear Barnabas":

"I have within an hour received your interesting postal card of the pretty group in one of the parks.

I am especially glad to get something in your own handwriting, and know from you that you and your family escaped the terrible catastrophe. I hope that you are well. Of course you must have been very busy since the earthquake but when you do have a spare half hour, I hope you will write me and let me know a little about your experience. I am also glad to know that you got my two letters, and suppose that one of them is the one written on the Atlantic in August.

We have had a remarkably pleasant autumn with no snow until the first of January, and then very little. I am much occupied but keeping pretty well, and enjoying very much my new house, which is most comfortable, and where I have a spare room to which I can invite you. Is there any chance of your coming to these parts within six months? If you have any snap shots of yourself or your family, it would be most interesting to see them, and do you happen to know anything of our former guide, Kin Nagura? If you do, I should be so glad to have his address. Hoping that 1924 will be very kind to you, and that you will all keep well, I am,

Your old friend and traveling companion,

FRANK H. BEEBE."

Letter of January 7, 1924, addressed to Mrs. Philip B. Weld, Dedham:

"Dear Mrs. Weld: I have your letter in regard to Mitja Nikisch's recital for the benefit of the Children's Island Sanitarium.

I should like four seats, first row, first balcony, Nos. 11, 12, 13,and 14, over the stage, with an end seat.

Please find my check for $12 enclosed, and I shall be much pleased to give my name as a Patron.

Yours sincerely,

FRANK H. BEEBE."

Letter of January 8, 1924, addressed to Mr. Mudgett of the Boston Opera House:

"Dear Sir: I enclose herewith my check for $182 for which please send me opera tickets as follows:

3	tickets for	January	30th	(Matinee)	'Sniegurotchka'
4	" "	"	30th	(Evening)	'Barbiere Di Siviglia'
2	" "	February	1st	(")	'Carmen'
2	" "	"	2nd	(Matinee)	'Boris Godunoff'
4	" "	"	2nd	(Evening)	'Faust'
4	" "	"	5th	(")	'Sniegurotchka'
3	" "	"	6th	(Matinee)	'La Traviata'
2	" "	"	7th	(Evening)	'Boris Godunoff'
4	" "	"	8th	(")	'Manon'

"Seats to be in the second row from the stage, left center aisle, one an end seat.

Yours very truly,

FRANK H. BEEBE.

By C."

Letter of January 12, 1924, to Mr. Sharp:

"My dear Mr. Sharp: Before me is your note of January 10th in regard to the prayer books, which, I am sure, must be much needed. It seems most likely that if no leaf is inserted at the front of the book before they leave the Old Corner Bookstore, it will not be done. Now I have misplaced your kind suggestions that you sent me many weeks ago and I cannot put my hand on them now. If you were to send me these again, it might be that they could be put into the books at short notice. Would you like to do that?

I have received a check for $41.75 signed by George E. Dean, marked 'Envelope collections for January 6th' which

seems to require more data as to how the money was contributed and for what object, so that it may be explained on the books.

I am sending you two copies of the contract with the organist as we thought well to have it, and would suggest that you get both copies signed, so that you may keep one and Miss Kershaw the other. I suppose you would like to see her personally and talk matters over, and I should think it very important that she understand *all* that she is expected to do, and that she be reminded that a greater interest in her work generally would help matters very much and be appreciated. If I can assist you further in this matter, or if any points come up, will you kindly let me know.

I went over the church and St. Barnabas House quite thoroughly with McKilligan the other day. I sent word to the mason to come and attend to the plastering in the cellar of the church, and also to Mr. Howe to come and make a new bulk head door to the church outside staircase, and also arranged with McKilligan to paint the basement of St. Barnabas House a yellow and red, as you and I thought would be very nice. I also yesterday asked Warren Davis to see McKilligan in regard to the window shades for St. Barnabas House, which I discussed at length with McKilligan. The iron pipe for the porch lantern I have brought to Boston, and will see what can be done about it.

We still have the matter of the church windows, and the lighting and the hymn board to consider, all of which takes time.

Hoping this finds you in good spirits, and with my remembrances to Mrs. Sharp, I am, Yours sincerely,

FRANK H. BEEBE."

"Monday, January 14, 1924

P.S. I have spent one-half hour this morning at McKenney & Waterbury's and as a result, I am sending to McKilligan, a new bit of piping and burners, which, while not exactly the size of the old one, can, I hope, be made to work for the lantern."

Letter of January 15, 1924, to Eric H. Waterlow:

"Dear Sir: I am very sorry that this letter should reach you so long after the plants, which you so kindly sent me. Your name was not on the parcel, and I had mislaid the notes that I made when I was in Manchester so that I was obliged to wait until I could get your name from my gardener, Nils Carlson. It was very nice of you to remember and take the pains to send me the plants, and I am glad to tell you that they are doing well in my greenhouse, so that I suppose I may look for blooms in the spring. Wishing you a very comfortable and successful year, I am,

Yours very truly,

FRANK H. BEEBE"

Letter of February 7, 1924, addressed to Nils Carlson:

"Nils: I have your statement before me, the last date of which is February 1st. I notice that a good deal of time has been spent down near the railroad station in cleaning up. All the men seem to have worked two days down there. You ask about the fence. I think the fence had best be repaired, and you better go on and do it when the weather is suitable. I think as a rule it is better not to put all the men on one job at a time but rather two and two.

The seed list I have not had time to look over, as I have been keeping rather quiet the last ten days. Have the dead trees in the Celia D. Robinson lot been cut down, which I pointed out to you a good while ago, and the gutters swept out, and roads left in the proper condition, and the water turned off.

I am sorry not to have more flowers, and hope that as the weather gets warmer, we may have them twice a week.

In writing the weekly statements, you might say where you are creosoting, and where you are chopping, and also let me know how Alfred is since his visit to the doctor in Boston. I hope Mrs. Carlson and you are very well.

Yours truly."

Letter of February 15, 1924, to Mr. McKilligan:

"Your good letter of February 13th was at hand, yesterday. I am very glad to know that the work has gone on so well, and that the lantern for the porch has been made to work. I have forgotten about the other lantern that you refer to, and do not remember just what was needed to be done to it, but if you can get it arranged, I think you had better do so. I am sure the painting of the basement must make it look very fresh and attractive.

I am feeling much better for the vacation I have had, and hope that you and your family continue to be very well.

Yours very truly,

FRANK H. BEEBE

by M L C"

Letter of February 18, 1924, to Nils Carlson:

"I received by Miss Robinson the very pretty Amaryllis lily from Highfield. As I have mentioned to you before, I want you to inform me of any special blooms that are coming along. I want to know when the Amaryllis and Gardenia, and any other special things are coming in bloom. Do not forget to mention this in your letters.

The seed list I have given a good deal of time to and will shortly send you a copy of the order. I hope before long we shall have some tulips from our greenhouse, and some other things.

Have all the teams been painted, and put in good order? I do not know if you have had the saw yet for the wood, but you can do so as soon as convenient.

I should like to go to Falmouth in this beautiful weather very much, but I am still keeping rather quiet. I hope that everything is going on well there. Yours truly,"

Letter of February 18, 1924, to Mr. Arnot:

"Dear Sir: I had the pleasure of a visit to Mr. Webster's greenhouses yesterday, and enjoyed very much seeing the beautiful things. The pink Amaryllis, which I thought very pretty,

was new to me, and also the red and yellow Freesia, which I had not seen before. What a beautiful shade of yellow. Would you kindly let me know what the group of plants in the last lefthand greenhouse is. I think I have asked you before but I have forgotten. They were blooming in all colors, and took my fancy very much. Hoping this is not troubling you too much, I am, Yours truly,"

Letter of February 19, 1924, to Lilian Olzendam:

"Dear Mrs. Olzendam: I have your clearly written very legible letter from the Underwood typewriter.

I shall hope to be able to hear Mr. Dalbeck on Friday evening. You mention a string quartette. I hope this does not mean that the piano is left out. I should be very sorry for that, and you do not mention the hour.

I think if Mr. Beebé's russet shoes are stained a little darker shade he will not object to wearing them with his morning suits, and they would look very well.

Yours sincerely,"

February 19, 1924, a letter consisting of three pages of various flowers, or orders for various flowers, giving a description of the kind of sweet peas, zinnias, asters, pink asters, carnations, daisies, petunias, phlox, salvias, and sweet peas, with the letter of February 20, 1924, to Nils Carlson:

"I am sending you under separate cover the Dreer catalog from which I sent an order for seeds yesterday, as per the enclosed list. On the list which you sent, and which I am also returning to you, I have marked with a cross those that I have not included in the order to Dreer, and for which I have substituted other things. You will notice on the list some seeds that are marked to go to Joaquin. Please let me know as soon as the order arrives. Yours truly,

FRANK H. BEEBE
by M. L. C."

[At this point counsel for the defendant read into the record a

letter dated January 15, 1927, from Frank H. Beebe to his niece, Mrs. Esther Hammond:]

"Anent our previous family conversations concerning Uncle Pierson's choice by will in the disposal of the residue of his estate, I am inclined to think that a careful study of the instrument reflects very accurately the reasons why he made the provisions he did. At the time he had his will drawn in 1911, his brothers and sister then living were Sister Emily, Brother Arthur and myself, and as he had taken care of all of his nieces and nephews by general legacies of $50,000 each, he bequeathed by the sixth clause of the said will the residue of his estate specifically to his brothers and sister as named, if they should survive him, and the issue then living of any of them then deceased. Of course he could not foresee future events and developments at that time, and thereafter never made any change in the residuary clause of the will, which was allowed by the Probate Court on September 14, 1926. It might be assumed that had your mother not died some 20 years before he executed his will, she might have been included in the residuary clause, but at any rate he named as residuary legatees his then living brothers and sister as aforesaid.

"In February, 1924, when attending to various matters pertaining to my own personal accounts and estate, I drew a Deed of Trust which was to take effect in practise if I should survive Uncle Pierson and if I received anything from his estate either by will or, if surviving him he died intestate, at law. This instrument was executed February 13, 1924, and to absolutely clear the title to the property, was confirmed by a Deed attached and recorded with the original shortly after Uncle Pierson's death. The Messrs. Welch, Brown and myself are the Trustees named in this Deed which is irrevocable, and by its provisions I am only able to use the income from this fund from Uncle Pierson during my lifetime.

I hope that the above two paragraphs will make clear in your mind some of the problems and questions which may have been troublous lately. Affectionately,"

At this point counsel for the defendant read into the record a letter dated June 11, 1927, from Frank H. Beebe to William H. Dunbar, Esquire, 161 Devonshire Street, Boston, Massachusetts, as follows:

"Dear Mr. Dunbar: Thank you for your letter dated June 3d concerning Mrs. Hammond's balance now in your hands. I am sailing for England Sunday on the 'Laconia' and inasmuch as I have just made a present of $4,000 to Frances Hammond I have no plans at present for any further gifts to the Hammond family. Yours very truly,

P. S. I think it would interest you to know, if you have not already been told, that at last Christmas time I made Mrs. Hammond a gift of $100,000."

At this point counsel for the defendant read a letter from Frank H. Beebe dated October 11, 1923, as follows:

"Mr. Frank H. McCulloch, 232 South Clark Street, Chicago, Illinois.

Dear Sir: Your favor of October 8th is duly received in regard to your and Mr. Hammond's proposed visit to Boston.

We fail to understand the necessity of Mr. Hammond's incurring the expense of a second visit to Boston after his recent lengthy conferences with Messrs. Welch and Brown. Mr. Sylvester Brown, my representative, is to be away from Boston until the end of October. Should it seem to Mr. Hammond and to you that a further conference is desirable with yourselves and Messrs. Dunbar, Welch, Brown and Tyler, no doubt a date in the early part of November can be arranged which will be convenient for all these gentlemen.

Yours very truly,

FRANK H. BEEBE"

JOHN WALLACE GOODRICH, a witness called for the plaintiffs, testified in substance as follows:

I am director of the New England Conservatory of Music and have been since January 1, 1931. I became a member of the faculty of that institution in the fall of 1897, and from 1907 until 1931

was dean of the faculty. I knew Mr. Beebe from about 1890 until the time of his death. He became a trustee of the Conservatory in December 1928. I saw him occasionally from 1920 to 1932. He seemed to be in good health and to take a keen enjoyment in life. He took an interest in the welfare of the students, in being of help to them, and one of his particular means of happiness was his hearing of music. He was a regular attendant at concerts of various kinds. He came frequently to the Conservatory concerts and to other concerts. He expressed himself about programs and performances in a way which showed a very keen interest, and, from the portion of his music library which came to the Conservatory, I was struck by the very excellent character of the music which evidently he had been using. He showed his interest in students of music by having them frequently at his house and by giving financial assistance. He contributed to the fund for the new building for the Conservatory and also made other contributions.

I never observed anything that indicated an apprehension of death on the part of Mr. Beebe.

SYLVESTER BROWN, a witness called for the plaintiffs, testified as follows:

I live in Cambridge, Massachusetts. I am one of the executors of the will of Frank H. Beebe, and, as such, one of the plaintiffs in this case. I first met Mr. Frank Beebe in the spring of 1921, when I went to the Beebe office at 6 Beacon Street, Boston, as office manager. I have remained in that office ever since. All the Beebe accounts were handled in the Beebe office. As office manager I supervised the general routine of the business and managed the real estate.

When I first came there Frank Beebe was one of the guardians of the estate and person of his brother, Pierson Beebe, and also a trustee under the will of his father James M. Beebe. Frank Beebe kept track of the business in a general way. He signed the investment checks until I had power of attorney. He liked to sign the salary checks. He would talk business at intervals and sometimes he would attend the coupon cutting. But, after 1922, when he gave me the power of attorney to sign his checks, I signed most of the checks and attended

to his business as fiduciary, in so far as he did not delegate any discretionary power. After 1922 he did not come to the office regularly. When he was in town he probably came three or four times a week from about eleven o'clock until one, and in the afternoon he was quite likely to come in for a while to sign personal letters which he had dictated in the morning. In later years he came in earlier in the morning and did not come in the afternoon. He never was in the office throughout the regular office hours, nine to five. After I had the power of attorney his visits to the office became less frequent. He went abroad in 1922, 1923, 1925, 1926 and, I think, 1929.

The number of the safe deposit box at the Union Safe Deposit Company in which Mr. Frank Beebe's personal securities were kept was A536. The securities belonging to the estate of Pierson Beebe, of which Frank Beebe was one of the guardians, were kept in the same box.

At this point the testimony of the witness was interrupted to take the testimony of GEORGE G. BRADFORD, a witness called by the plaintiffs, who testified substantially as follows:

I am manager of the Union Safe Deposit Vault in Boston, and have been for thirty years. We keep records showing when access is had to safe deposit boxes in our vault. I have looked at the records to see how often access was had to box A536. Sohier Welch, Sylvester Brown and Mr. Beebe had access to this box. Any two of those three could go. Our records indicate that during 1923 box A536 was opened eleven times and that on only two of these occasions did Mr. Beebe go to the box.

The witness SYLVESTER BROWN then resumed his testimony and testified substantially as follows:

The trips abroad made by Mr. Frank Beebe were anywhere from three weeks in 1923 to four months and a half in 1926. Pierson Beebe died on August 8, 1926. I cabled to Frank Beebe, who was abroad. He did not return at once, but sailed on August 26, his regular sailing date, and did not get back until the early part of September.

After 1922, whenever Mr. Beebe was in Massachusetts, I should say that he came to the office about three times a week, except when he was at Falmouth, and when he was there he came about once in every ten days or two weeks. When Mr. Beebe came to the office during the year 1923 he would usually call me into his office for about five minutes and talk over general matters, and after that he would spend the rest of his time with his private secretary dictating personal letters, and attending to his own mail, and attending to his private business. He would make out programs for musicals and send out invitations. There were long periods of time when he would not discuss business matters with me at all, even though he was coming to the office, unless I became insistent. There were such periods lasting sometimes two or three weeks. He several times said things indicating that he did not want to talk business. He also told me very frequently that he disliked business details.

I had a conference or two with Mr. Beebe in regard to the trusts which are known here as A, B, C and D trusts some time between January 1 and January 15, 1924, to the best of my recollection. He discussed the various beneficiaries and the amounts. I am acquainted with all of the beneficiaries of the trusts except Mrs. Katherine Reed Tisdale. Archibald Reed Tisdale was a very close friend of Mr. Beebe and his family. The income which was to be paid from the trust to him was, roughly, about four hundred dollars a year. Henry Herbert Smythe was minister for many years at St. Barnabas Church in Falmouth and was a very close friend of Mr. Beebe. Mr. Beebe had made gifts and other provisions from time to time to him. George Gooding was the coachman and caretaker and Mr. Beebe had made gifts to him in the past. The trust, of which they were beneficiaries, was terminated before Mr. Beebe's death, after the death of Mr. Smythe, and one-fifth of the principal was actually turned over to Mr. Beebe during his lifetime.

Mary Van Arnam Brown, who was beneficiary of trust B, died before Mr. Beebe. Up to the time of her death the entire net income, approximately between $4500 and $5000 a year, was paid to her. She was a first cousin to Mr. Frank Beebe, a maiden lady of very moderate means. Before this trust was made Mr. Beebe every year would

augment her income to give her sufficient income to live on, and paid her rent direct, and she spent the entire summer and fall with him at Falmouth.

The principal amount of trust C was $125,000. $1500 a year income from this was paid to Constance Tippett. She and her mother before her were friends of the entire Beebe family and Mr. Beebe had made many financial contributions to her.

Katherine Tisdale was the mother of Archibald Tisdale. Mary Louise Cummings, who received $1200 a year from the income of this trust, was Mr. Frank Beebe's private secretary over a great many years and he had made frequent contributions to her. Albert E. Rhodes was one of the old scriveners in the office. He had been there forty-five years. Mr. Beebe helped him with hospital bills and medical bills and clothing.

Sarah B. Field, who received income under trust D, died before Mr. Beebe and the principal of that trust fund was paid over to me and Mr. Welch, who were trustees under the trust for Constance Tippett and others, prior to Mr. Beebe's death, so that trust C absorbed trust D. Miss Field was a school teacher and Mr. Beebe had made gifts to her before the creation of these trusts.

George Fiske Hammond was a grand nephew of Mr. Beebe. Esther Hammond was a niece of Mr. Frank Beebe and Mr. Beebe had made gifts to her in the past. George Fiske Hammond was a son of this Mrs. Hammond. Frances L. Hammond, Elizabeth C. Hammond, Esther Beebe Hammond, and Mary C. Hammond were children of Mr. Beebe's niece, Mrs. Esther Hammond. At the time of the creation of the trust most of them had recently become of age. Generally speakiing, they were in or about the twenties.

Trusts A, B, C and D were set up on my books February 18, 1924, and the property had been received shortly before that.

[At this time counsel for the plaintiffs introduced in evidence form of receipt which the witness identified as being used for trusts A, B, C and D. This was marked "Plaintiffs' Exhibit 12". Counsel for the plaintiffs called attention to the fact that on the form of receipt it appears very prominently that Mr. Beebe was the creator of the trust.]

The witness continued his testimony and testified substantially as follows:

Mr. Beebe wanted these beneficiaries to know that Mr. Welch and I were the trustees but that he was the donor, and he wanted his name to appear in connection with it.

The real estate in the large trust, which we called the "F. H. B.", was set up on our books in December 1926. I think it was in April, 1927, when we received the securities. I and my co-trustees or trustee administered the property which we received under that trust in accordance with the terms of the instrument which is in evidence as Exhibit 7. We filed a copy, or an original, of that instrument in the Registry of Deeds of Suffiolk County in Boston.

[At this point it was stipulated that the two instruments, the one dated October 22, 1926, signed by Mr. Frank H. Beebe, and the instrument which that confirms, dated February 13, 1924, and also papers in regard to the resignation and appointment of trustees, which were in evidence as Exhibit 8 (those being dated also October 22, 1926), were all received and entered by the Registry of Deeds of the County of Suffolk on October 23, 1926.]

The witness continued his testimony and testified substantially as follows:

I filed the originals of those instruments, and the trustees under that trust have filed accounts every year, and they have been allowed and the items finally adjudicated. We have also administered trusts A, B, C and D according to their terms. We filed copies of the declarations of those trusts, evidencing those trusts, in the office of the Registry of Probate of Suffolk County and we filed accounts, and those accounts have been approved by the court.

Going back to 1924, Mr. Frank Beebe did not discuss with me the creation of this trust relating to the property of Pierson Beebe and I had nothing to do with the formation of it. I saw Mr. Frank Beebe shortly before he went to the hospital but did not know he was going to have an operation until two or three days before that. From what appeared to me I thought that Mr. Beebe was well. When I saw him two or three days before he went to the hospital he was a trifle irritable, but he was quite apt to be so. Except for that,

I did not notice anything out of the usual with him. Mr. Beebe, neither at that time nor at any time before his operation, indicated in any way to me that he contemplated death or that he was doubtful as to whether he was going to live on. I saw him ten days or two weeks after his operation and frequently after he recovered. His health was better than ever before. At no time during 1926 do I recall that he said anything indicating that he contemplated death or that he might not have long to live. I must have received instruction from Mr. Beebe that caused me to write a letter to Symphony Hall dated March 4, 1924.

[At this point counsel for the plaintiffs introduced this letter in evidence and it was marked "Plaintiffs' Exhibit 13". Counsel for the plaintiffs then read into the record this letter, which read as follows:

"Symphony Hall, Boston, Mass.

Dear Sirs: Will you kindly reserve for Mr. Frank H. Beebe's refusal four seats for Chaliapin who appears, I believe, some time during the middle of April. Please make the reservation in that part of the balcony where seats are usually allotted to Mr. Beebe. Yours very truly,

SYLVESTER BROWN."

[At this point counsel for the plaintiffs introduced in evidence a letter from Sylvester Brown to Frank H. Beebe, dated October 20, 1926, which was marked "Plaintiffs' Exhibit 14".]

This letter was read as follows:

"Dear Mr. Beebe: Our real estate attorney, Mr. Henry H. Meyer, of Rackemann, Sawyer & Brewster's called me up this afternoon to find out if you had as yet signed the confirmatory statement attached thereto and now a part of the Deed of Trust which you executed in February, 1924. The reason for his inquiry was because the party wall agreement at the property numbered 7 and 9 Newbury Street must now be executed and this cannot be done until your deed has been made a matter of record, thus clearing the title.

He spoke of having the Deed tomorrow and I told him I thought you would sign tomorrow morning after my explanation.

Another reason why this should be done immediately is on account of the lease for the first floor and basement, which must be signed in the near future. As you know, the trustees which you named were Mr. Welch and myself, the entire net income to be paid direct to you quarter-yearly during your lifetime and thereafter as you have directed. Yours sincerely,

SYLVESTER BROWN.

Please see postscript.

P. S. When you and I were studying your Deed of Trust some weeks ago you intimated that inasmuch as you had not appointed yourself to act as trustee with your appointees you had estopped yourself from benefiting in the trustees commissions on income on property which you would have owned outright except for the Deed. I feel very sure that you, Mr. Welch and I can make some arrangement concerning this phase of the matter which will be mutually satisfactory. S. BROWN."

The witness thereupon continued his testimony and testified substantially as follows: The statements in that letter are true and the arrangement mentioned in the postscript was made. One-third of the commissions on the income were paid to Mr. Beebe as trustee during his lifetime. The rate of commissions was just the same on the other trusts, but Mr. Beebe did not receive any of the commissions. The result of Mr. Beebe's being appointed trustee was that the total commission was the same as if he had not been, but that Mr. Beebe got part of the commission.

I was one of the executors of the estate of E. Pierson Beebe. I became his guardian, I think, during 1924. Mr. E. Pierson Beebe, though under guardianship, had a very keen mind and asked all sorts of questions about his real estate, his bank account, and his securities. He had also a very keen memory. Two or three times he stated to me that the father of Mr. Sohier Welch, Mr. Francis Welch, whom he had appointed executor of his will, had died, and he stated that he was not particularly well acquainted with Mr. Hooper, the other executor appointed by his will in 1911, and told

me that, since Mr. Frank Beebe and Mr. E. Sohier Welch and I were handling his affairs, we should be appointed executors. One time, when I was at Falmouth, on July 15, 1925, Mr. Pierson Beebe brought up the subject again and stated that he wished us three appointed executors, and I, accordingly, dictated the codicil and he executed it there. Mr. Frank Beebe was abroad at the time and, as far as I know, he did not know that he had been appointed until after his return from abroad. Mr. Frank Beebe had never acted as an executor or an administrator until the death of Mr. Pierson Beebe. I saw Mr. Frank Beebe after 1926 and he was "a well man".

On *cross-examination* the witness SYLVESTER BROWN testified substantially as follows:

I was not intimately connected with the discussion of the real estate trust of the James M. Beebe estate, which was abandoned in 1926. I did act as a go-between. I did not prepare the income tax returns of Mr. Beebe. They were prepared by certified public accountants under my supervision. Mr. Frank Beebe signed his own returns, and I signed the trust returns. The returns were made out by certified public accountants and he must have scanned them. There was no discussion of tax affairs other than those with reference to the real estate trust during the time approximating the execution of the five trusts in February, 1924, as far as I know. I do not know whether such taxes were discussed at that time.

Mr. Frank Beebe had made a gift of $100,000 to Mrs. Esther Fiske Hammond. There was no other gift as large as that. He had given a gift of $10,000 either to Mrs. Hammond or one of her children. Most of the gifts that Mr. Beebe made involved not more than $100 or $200. He often gave opera tickets and other gifts. Under the will of Frank H. Beebe I received a legacy of one thousand dollars in cash, and under the first clause of the will, with Mrs. Elizabeth Hammond, I was left all of his tangible personal property to dispose of in our discretion as he would have liked us to dispose of it, plus $2000 for operating expenses.

Mr. Frank Beebe's dislike for business was a continuous thing from 1922 on. After I first knew him in 1922, he never was a very

active man. He never had any business and was never active in the management of property. Mr. E. Pierson Beebe was entirely different from Mr. Frank Beebe and was a man of intense activity. After Mr. Frank Beebe and Mr. Sohier Welch became trustees of the trust under the will of James M. Beebe, Mr. Welch was the active trustee, although the books were kept in the office of Mr. Frank Beebe. After I had "found myself" in 1921, I took over a good many of the details of the property management from Mr. Beebe.

My activity in regard to the formation of the A, B, C and D trusts was due to the fact that I knew the persons involved and their needs.

On *redirect examination* the witness SYLVESTER BROWN testified substantially as follows:

The gifts to Miss Mary V. A. Brown aggregated at least $1200 a year and, although gifts to some of the other people were probably small at any single time, they were substantial in the aggregate and included trips abroad.

George E. Brown is in the South at the present time. As far as I know, Mr. Beebe never consulted him personally.

At this point it was stipulated that, if judgment is to be for the plaintiffs, it should be for such an amount as may be agreed upon by counsel, and, in the event of their failure to agree, such amount as the court should determine.

It was also stipulated by counsel that in March, 1935, there was assessed against the plaintiffs as executors of the estate of Frank H. Beebe an additional tax of $514,718.92 plus interest of $41,544.17, a total of $556,263.09.

At this point the plaintiffs rested.

Counsel for the defendant then introduced in evidence documents marked "Defendant's Exhibits D," "E", "F", "G", "H" and "I". Defendant's Exhibit F is the same as Exhibit A annexed to the plaintiffs' declaration; Defendant's Exhibit G is the same as Exhibit C annexed to the plaintiffs' declaration; and Defendant's Exhibit H is the same as Exhibit D annexed to the plaintiffs' declaration.

At this point it was stipulated that Defendant's Exhibit I, a letter from the Deputy Commissioner to Rackemann, Sawyer and Brewster,

dated October 5, 1935, was an answer to the request of the executors of the estate of Frank H. Beebe, dated September 25, 1935.]

At this point counsel for the defendant read into the record a letter dated May 26, 1923, reading as follows:

"Dear Mr. Muhlbauer: Your letters have come quite regularly and often, and I have to thank you not only for the interesting accounts of what you are doing, but also for the gay and interesting effect of the stamps.

I have wished to write you several times but the pressure of other things has prevented. It is interesting to hear just what you are doing, and how your days are spent.

Our place at Falmouth now is looking very lovely indeed, and the gardens give great promise of blooms soon. I think the plants have gotten through the winter rather better than we have, as they do not seem to be sick at all, and are coming up very strong and fine.

Our symphonies were over the first of May, and the popconcerts are now going on, and are very good.

Only two days ago I went to a beautiful horticultural exhibition in two big tents in Brookline. You would have enjoyed the flowers, as they were contributed by four of the best gardeners thereabouts.

I enclose a little clipping from a paper for you to read. We do not hear very much just now about the disturbances in the Ruhr, and perhaps the people there have decided to go on quietly with their work, and do the best they can for the French.

When is your next birthday, and if you do not mind, how old will you be?

Is your piano in good order now, and are you expecting to go to Bavaria for the benefit of your health?

I do not know that you really need it, but I think I will enclose $10 for you, and shall be glad to know if it reaches you safely.

Next time I write I will try and tell you the number of letters and postal cards which you have kindly sent, all of which I think have come safely to hand.

I am just ordering some new Dahlia bulbs to put with my personal collection, which will be very interesting.

Yours very truly,

FRANK H. BEEBE."

In answer to a question of the court, the witness SYLVESTER BROWN stated that Mr. Muhlbauer, the addressee, was an old friend of Mr. Beebe living in Germany.

JOHN B. MADORE, a witness called for the defendant, testified in substance as follows:

I am and since 1922 have been internal revenue agent on estate tax investigations. In connection with the investigation of the estate of Frank H. Beebe I interviewed Dr. Seabury W. Allen early in 1932.

At this point the testimony of the witness was suspended and the witness Dr. SEABURY W. ALLEN, who had previously testified for the plaintiffs, was recalled for cross-examination. Upon *cross-examination* the witness, Dr. SEABURY W. ALLEN, testified substantially as follows:

I remember having an interview with an internal revenue agent. In this interview I said that I saw Mr. Beebe occasionally, but not every day for a month or two, and not for nervousness, but for various very trivial matters. I think the so-called nervousness was an unimportant matter. Mr. Beebe was not losing sleep considerably because of nervousness. I never said that Mr. Beebe was an invalid type of man, always nervous and complaining, always afraid he would go insane because there was insanity in the family. I remember saying, in substance, that his two brothers and sister became insane and that a cousin was in the insane asylum. I recall only one occasion on which Mr. Beebe spoke of mental difficulty and that was after his brother's commitment to the hospital, when he asked, "Are we all going that way?" Mr. Frank Beebe had a hollow back due to bad posture. There was nothing defective about it. It became aggravated over a period of time and caused a hollow spine.

He walked extremely well. I do not remember saying that he walked with difficulty. I do remember stating that Mr. Beebe had a bad bladder trouble and had a prostate operation performed by Dr.

Quimby of the Peter Bent Brigham Hospital, and that my old records were stored away and were not accessible so as to give me the date. I do not remember saying that Mr. Beebe was very seriously ill at the time of the prostate operation. I could not have said that because he was not seriously ill. I do not remember whether I told the inspector about hernia, but it is a fact that Mr. Frank Beebe did have a hernia early in 1930, but it did not call for an operation. It never disappeared. Treatment was given for it until his death. I do not recall stating that Mr. Beebe had developed hardening of the arteries but that I could not recall the exact date when this began.

The only hardening of the arteries which I was aware of occurred just prior to his death, possibly in September of the year he died. He may have had arterio-sclerosis before that time without my knowledge. That is universal in all people of his age. It is true that he was getting weak toward the end, but he had no symptoms that alarmed me. It is not true that Mr. Beebe was ill for a year before he died. I do not remember saying that he may have expected insanity or that I did not believe he contemplated death except possibly the last two years of his life. I did not have any other interviews subsequent to this time with Mr. Madore or any other government representative. I recall the one interview but not at all clearly.

In answer to questions of the court the witness Dr. SEABURY W. ALLEN testified substantially as follows:

Mr. Frank Beebe was a nervous type of individual, I suppose congenitally. His nervousness was nothing specific. The type of hernia which he had was double inguinal, both sides. The treatment which I prescribed was a truss. When he used the truss there was no danger of strangulation and he was perfectly comfortable.

On further *cross-examination* the witness Dr. SEABURY W. ALLEN testified substantially as follows:

I received a legacy of $5,000 under Mr. Frank Beebe's will.

At this point the witness JOHN B. MADORE was recalled for further *direct examination* by the defendant and testified substantially as follows,—the court admitting his testimony only as bearing on the credibility of Dr. Allen:

I made a copy of a report right after interviewing Dr. Allen. I made notes when I was talking and made this report from my notes. Dr. Allen stated that he had treated the decedent for nervousness for 25 years, and sometimes would see him every day for a month or more, then perhaps would not see him for several months afterwards, when he would have to start over again. He described the decedent as an invalid type of man, always nervous and complaining and afraid that he would become insane because there was some insanity in the family. Dr. Allen named two brothers and a sister and a cousin who had become insane.

Dr. Allen stated that the decedent used to ask him if he would go insane, and he would try to talk him out of it, advise him to travel abroad, go to the theatre, and not to think of himself. He said the decedent had a weak back and walked with difficulty but that up to a few years before his death he was able to go to his office. He said the decedent had a bad bladder trouble; that he had a prostate operation performed by Dr. Quimby at the Peter Bent Brigham Hospital. He could not recall the exact date of the operation and suggested that I go to the hospital and get the record there, which I did. There was some confusion about the dates. He could not recall exactly when it was that the operation took place; he thought it was either 1920 or 1922. I asked him about 1924 and 1925, and he thought that the decedent was all right at that time, that he had recovered from the prostate operation, although he said he was seriously ill at the time.

I asked him to consult his own records about that time and he said they were not accessible, and it seems to me that he said they were packed away, or something like that. He spoke of his having a hernia four or five years before his death, but didn't want to be operated on for it. He also spoke of his hardening of the arteries, but he couldn't recall when that was. He said his heart was getting weak towards the end, but he had no symptoms that were alarming him (I think the "him" refers to the decedent, Mr. Beebe), and that about a year before his death Mr. Beebe became very ill with his heart and was ill until he died. He did not believe that the decedent,

Mr. Beebe, contemplated death, except possibly the last two years of his life, but he may have expected insanity.

On *cross-examination* the witness JOHN B. MADORE testified substantially as follows:

I first began to investigate the Beebe estate case in the early part of the winter of 1932—some time between January and May, because my report was made in May. I have not my original notes with me and I do not know where they are. I should have to look, but I have not had a chance to look them up. I have been interested in this case ever since there was a question about the estate, and I have been present at all the hearings and had had many conferences with Mr. Meyer. I do not know whether I had those notes at that time. I was conscious of the existence of this report at that time and I saw the various affidavits in the case at the hearing, and I think that I examined them. Without looking at my original notes, this sounds like an accurate, exact report of what Dr. Allen said to me. My original report was written in longhand and this is a photostatic copy. This report embodies what I made of notes.

In response to the question "Is it an exact copy of your notes that you made at Dr. Allen's office?", the witness replied "Well, the facts would be the same", and then continued in cross-examination to testify substantially as follows:

I naturally wrote as fast as I could. There may have been some conjunctions or something like that that I have omitted. I wrote as fast as I could while he was talking. I put down what he said in my notes, but I could not do it word for word, but I would have to have my notes here to tell whether I did or not. I have no recollection of the comparison between the report and my notes. It is two years since I have seen the original notes. My memory is clear about what Dr. Allen said only after refreshing my recollection from the report. I am sure that I saw Dr. Allen between January and May of 1932 because that was the time that I investigated the case. My only recollection of what Dr. Allen told me is what I get from reading this report. I could not remember what he said to me at the time. I realize that Mr. Beebe died in November of 1932. I

guess I have my dates mixed up. I meant that I saw Dr. Allen in 1934, not 1932.

I made the original report with reference to the preparation of the case for the Government in Boston.

Then the witness testified under further cross-examination as follows:

"*Q.* Now, I want to ask you this: You were conscious of what Dr. Allen had said to you all the time and you saw his affidavit, did you not, heard it read and examined it and were furnished a copy of it. Did it occur to you that in any of these conversations that you have had with Mr. Meyer or with counsel for the government to state that there was any part of that affidavit that was not accurate, when he spoke about the health of Mr. Beebe? *A.* Well, I called attention to my chief in the office. . . .

Q. You have been sitting here during the trial and heard Dr. Allen testify? *A.* Yes.

Q. Did you mention this report to Mr. Zimmerman? *A.* I think I did.

Q. When? *A.* I am not so clear about that. It seems to me I first mentioned it a couple of weeks ago, that I mentioned to either Mr. Zimmerman or Mr. Carr about this.

Q. You didn't after Dr. Allen had testified, did you? *A.* I didn't; no, I didn't.

Q. Why not? *A.* Well, I had nothing to do with the carrying on of the case.

Q. Haven't anything to do with the carrying on of the case; aren't you especially interested in the case as representing the estate department of the revenue departmnt? *A.* Well, I did ask him why he didn't cross-examine him.

Q. Why, he didn't cross-examine him; that's all you asked him? *A.* Yes."

The witness then testified under further cross-examination substantially as follows:

I do not remember whether Mr. Zimmerman and I discussed this report or not. We talked about it this morning. I do not think I

talked about it to Mr. Zimmerman prior to this morning. I cannot remember that Dr. Allen told me about Mr. Beebe's coming to him and asking him when Mr. Pierson Beebe became incompetent whether he was likely to go the same way. I cannot say whether he said that was the only occasion. I cannot remember anything beyond what is stated in the report. I learned of the operation from Dr. Allen. I do not remember that Dr. Allen told me the time that he told Mr. Beebe that an operation would be needed. I knew at the time that it was important to ascertain when Mr. Beebe knew that an operation would be necessary, and I probably did ask him that question. If I had that answer, it would appear in the report.

At this point it was agreed that, with the elimination of certain passages, the affidavit of Dr. LEONARD C. JONES might be admitted in evidence. With these eliminations, the affidavit was then read into the record as follows by counsel for the plaintiffs:

"I am a graduate of Harvard Medical School of the class of 1890. In 1911 I took up my residence in Falmouth and since then have practiced medicine in that town. About 1920 I became acquainted with Frank Huntington Beebe, of said Falmouth, and with his brother E. Pierson Beebe. From that time until their deaths (which occurred on November 20, 1932 and August 8, 1926, respectively) I acted as their physician whenever they were in Falmouth.

"So far as I know Frank Huntington Beebe never had any illness of a serious nature until the winter of 1924. He returned from abroad late in the summer of 1923 and soon after his return asked me to see him. His condition seemed excellent, except that he complained of a slight irritation of the bladder. I prescribed some simple remedy (the nature of which I have now forgotten) but it proved successful, and I had no occasion to call on Mr. Beebe again that summer.

"I heard that he had had a prostate gland operation in the winter of 1924 and saw him early the following summer. His condition at that time was excellent, and from then until shortly before he died it remained so. At no time during that period

was there any expectation on my part, nor so far as I know on any one's part that his death was to be expected before the lapse of many years. During my long acquaintance with him there was never any suggestion made by Mr. Frank Huntington Beebe to me which indicated that he contemplated an early demise.

"E. Pierson Beebe spent the summers of 1923, 1924 and 1925 at Falmouth, and I was occasionally called to treat him for minor ailments. He was quite an old man, but his physical condition was good during those years, considering his age, and at no time during that period was there any expectation on my part,, nor so far as I know on any one's part, that his death was imminent or to be expected before the lapse of several years. I attended him at his last illness in the early summer of 1926."

Upon agreement counsel for the defendant then read from a copy of the report of Internal Revenue Agent Madore, dated July 6, 1934, as follows:

"Dr. Lombard C. Jones, Falmouth, Massachusetts.

"Dr. Jones said that in the twenty years he had known the decedent he had not been called in more than two or three times previous to his last illness in 1932. That on those occasions the decedent had nothing of consequence, possibly a slight cold. He said that the decedent had a nervous temperament which made him worry about any little thing he had, but that he did not treat him for nervousness. He did not recall anything special about the decedent's condition in 1924, 1925 or 1926. The decedent made no statements to him in 1924, 1925, 1926, that would indicate he contemplated death and he does not think decedent contemplated death during that period. He said decedent was fairly normal during those years and that until 1932 he did not see any change in decedent in twenty years. Dr. Jones said that he was called in for the decedent's last illness in the latter part of the summer of 1932 while the decedent was at his summer home in Falmouth. He described the decedent's condition at that time as heart trouble, that he was very weak, could not sleep well and generally showed that he was suffering

from arteriosclerosis. During that last summer he discovered that the decedent had a small hernia and he got a truss for it, but he does not believe that the decedent wore it. Had not noticed that the decedent had difficulty in walking and did not know he had a weak back as described by Dr. Allen."

The witness JOHN B. MADORE was then recalled and testified substantially as follows: I could not find my notes. I found the longhand report.

The witness SEABURY W. ALLEN was then recalled by the plaintiffs and testified substantially as follows:

Mr. Madore was at my office perhaps ten minutes. He asked me a few questions and wrote down my name and Mr. Beebe's name. He did not write the answers to the questions, according to my memory.

Dr. WILLIAM C. QUINBY was recalled as a witness by the defendant and testified in *direct examination* substantially as follows:

I know that the Boston City Hospital has had an unfavorable mortality rate on prostate operations. I am not familiar with the results and do not know that a report has been made. I think the mortality is probably as much as twenty-five percent or thereabouts.

Upon *cross-examination* by counsel for the plaintiffs the witness Dr. WILLIAM C. QUINBY testified substantially as follows:

Many of the patients at the Boston City Hospital are in very poor condition before they reach the hospital. The mortality of operations for the prostate all over the world as of 1922, compiled on reports gathered between the years 1912 and 1922, shows a world mortality of 6.3 percent in 7565 cases. A city hospital such as the Boston City Hospital would have cases where the patient would be brought in where there had to be an immediate operation, and, under those circumstances, the mortality is likely to be increased.

[At this point it was stipulated by counsel that in February, 1923, the value of Frank H. Beebe's own property was nearly three million dollars—in the neighborhood of $2,857,837.

It was also stipulated by counsel that neither the Registry of Pro-

bate nor the Registry of Deeds received either the instrument of February 13, 1924, which was executed by Mr. Beebe, or the confirmation of that instrument dated October 22, 1926 (copies of which instruments are in evidence as Exhibit 7), until October 23, 1926, but that they were received by the Registry of Probate on January 3, 1931, and by the Registry of Deeds on October 23, 1926.]

The foregoing, with the exhibits referred to above, is all of the material evidence in the case.

At the trial the plaintiffs filed requests for rulings of law as appears below. The court allowed the same "in so far as they are consistent with this opinion" (the opinion of the court), and denied them "in so far as they are inconsistent".

At the trial the court noted the exceptions of the plaintiffs to the refusal of the court to grant each of the following of the plaintiffs' requests for rulings of law:

"1. A transfer is not in contemplation of death within the meaning of the Revenue Acts applicable to estate tax on the estate of Frank H. Beebe unless the thought of death, other than the general expectation of death which all entertain, is the impelling cause of the transfer.

2. A transfer is not in contemplation of death within the meaning of said Revenue Acts if it is a gift *inter vivos* springing from a motive different from such thought of death."

"7. The instrument dated February 13, 1924, copy of which is in evidence as part of Exhibit 7, was not executed by Frank H. Beebe in contemplation of his death.

8. An attempted transfer of property which one expects or hopes to receive from the estate of a person who is still living upon the death of that person is inoperative in the absence of actual consideration or a deed containing a warranty or covenant of some kind or language having the effect of a warranty or covenant.

9. No trust or valid transfer of property was created by the execution and delivery of the instrument executed by Frank H. Beebe on February 13, 1924, copy of which is part of Exhibit 7.

10. A valid trust of the property to which Frank H. Beebe

became entitled by virtue of the residuary clause of the will of E. Pierson Beebe was created by virtue of the instrument of confirmation executed by Frank H. Beebe on October 22, 1926.

11. The gifts made by the instrument executed October 22, 1926, were completely vested beyond recall before the passage of the Joint Resolution of March 3, 1931.

12. Under the trust created by instrument executed October 22, 1926, interests vested immediately in the trust estate created thereby, not only in Frank H. Beebe, but in various other beneficiaries of said trust, and said interests vested more than six years before the death of Frank H. Beebe.

13. This trust created on October 22, 1926, was not created by Frank H. Beebe in contemplation of his death.

13A. This trust created by Frank H. Beebe on October 22, 1926, took effect in possession or enjoyment during the lifetime of Frank H. Beebe, more than six years before his death.

13B. This trust created by Frank H. Beebe on October 22, 1926, was not intended to take effect in possession or enjoyment at or after his death.

14. The Joint Resolution of March 3, 1931, amending the Revenue Act of 1926, and any re-enactment thereof, should be construed not to include transfers made prior to March 3, 1931.

15. If said Joint Resolution of March 3, 1931, or any re-enactment thereof, is construed to include any of the trusts involved in this case, it is to that extent invalid and void as in conflict with the provisions of Article V of the Amendments to the Constitution of the United States, inasmuch as said provisions, if applied to any of said transfers, would deprive the estate of Frank H. Beebe and the executors thereof of property without due process of law."

"20. In computing the federal estate tax on the estate of Frank H. Beebe, none of the property of the trust created by him to hold property distributed to him under the will of E. Pierson Beebe should be included as part of the gross estate.

21. Although the determination of a deficiency by the Commissioner of Internal Revenue is *prima facie* correct, the pre-

sumption is open to be overcome by adequate testimony, and the burden upon the taxpayer seeking to recover the amount paid as such a deficiency is only the ordinary burden of sustaining his case by a fair preponderance of the credible evidence. If, in such a case, the plaintiff establishes his case by a fair preponderance of the credible evidence introduced at the trial, the fact that the Commissioner has made a determination against the taxpayer is entitled to no weight.

22. Section 403 (a) of the Revenue Act of 1921, which was in effect on February 13, 1924, provided that in determining the value of the net estate for the purpose of the estate tax there shall be deducted:

> '(2) An amount equal to the value of any property forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise or inheritance or which can be identified as having been acquired in exchange for property so received.'

A similar provision appears in all subsequent Revenue Acts.

23. Judgment should be ordered for the plaintiffs in the sum of $553,818.94, with interest thereon at the rate of 6 percent per annum from May 2, 1935, to the date of judgment.

24. The plaintiffs are entitled to costs."

At the trial the plaintiffs filed requests for findings of fact. The court refused to grant such requests except in so far as the findings were made part of the opinion. At the trial the court noted the plaintiffs' exceptions to the refusal of the court to grant each of the following of the plaintiffs' requests for findings of fact:

"1. The allegations of the declaration, in so far as admitted by the defendant's amended answer, are true."

"7. Frank H. Beebe was also greatly interested in music, and while in Boston regularly attended the opera, the Symphony concerts and other concerts, including the Statler concerts Wednesday mornings. He gave musical concerts at his own

home and had music students frequently at his house. He aided many of them financially and subscribed liberally to the Opera, to the Symphony, and to the Conservatory of Music, of which he became a Trustee.

8. Frank H. Beebe was also very fond of travel, and nearly every year up to about 1930 he went abroad for several weeks and travelled extensively there."

"11. After Mr. Brown became well established in the office, Frank H. Beebe was very irregular in his attendance there. He was often away for weeks at a time, and seldom, if ever, spent a long working day at the office. Even when he came to the office, he spent most of the time attending to his own personal affairs rather than the business of the office, and often, even when he was in Boston, days and weeks would go by without Mr. Beebe's discussing anything important with Mr. Brown. Mr. Brown attended to the routine management of the office; and all of the major decisions in regard to the handling of the trusts, such as changes of investments, were made in conjunction with Mr. Welch. All that Mr. Beebe did was to sign checks occasionally or to sign some letter prepared by Mr. Brown, and to consult occasionally with Mr. Welch or Mr. Brown; and occasionally, but not regularly, he went to the safe deposit box to cut coupons. Although Mr. Beebe kept track of things in a general way, he frequently told Mr. Brown that he did not want to hear anything about business."

"13. Many years before, Frank H. Beebe and other members of his family had established a trust for his mother's sister. Some time in 1922, Mr. Welch had suggested to Frank H. Beebe and other beneficiaries of the estate of James M. Beebe the desirability of forming a trust of the real estate owned by that estate. This matter was under advisement for several years. In the course of the discussions about this, Frank H. Beebe stated to E. Sohier Welch that he had made gifts from time to time to various friends and members of his family, that these gifts were rather irregular, and he was subjected to frequent requests for money from the recipients of his bounty. He

stated that he wished to make some more regular arrangements for persons to whom he wished to make gifts, and that he himself wanted to be relieved from the details of looking out for such payments. The matter was discussed at length over a period of several months by Mr. Welch and Mr. Beebe, and the two agreed that the purposes which Mr. Beebe had in mind could best be served by creating trusts for the persons to whom he wished to make gifts, by the terms of which these persons would receive the income. Mr. Beebe's income taxes were very high at this time, and Mr. Welch advised him that by making these trusts he would make substantial savings in income taxes.

14. During the course of the discussion about these trusts, Mr. Beebe also expressed concern about the additional care which would come to him if he inherited property from his older brother, E. Pierson Beebe. At this time Pierson Beebe had an estate of nearly $7,000,000, and, as Frank H. Beebe knew, by the terms of the will which Pierson had executed, before he became incapacitated, one-half of the residue of his estate was to go to Frank H. Beebe and the other half to a nephew, C. Philip Beebe, wso was incompetent and was under the guardianship of Frank H. Beebe and E. Sohier Welch. The investments in Pierson Beebe's estate were extremely diversified. There were several pieces of real estate and several hundred items of securities,—stocks and bonds of different kinds. Frank H. Beebe expressed a desire to bring about continuity in the management of all the properties with which Messrs. Welch and Brown were concerned. He stated that he assumed that whatever C. Philip Beebe inherited from E. Pierson Beebe would be managed by Mr. Welch as one of his guardians, but the question arose as to how to handle Frank H. Beebe's share. In the course of these discussions, Mr. Beebe also stated that he was concerned with the probability that if he inherited some of Pierson Beebe's property, the importunities upon him would increase, and stated that he wished to have the property tied up in such a way that he could say that he could not touch it.

Accordingly it was decided by Mr. Welch and Mr. Beebe to form a trust of this property."

"24. The instrument executed by Mr. Beebe on February 13, 1924, purported to 'grant, remise, release, assign, transfer and convey unto the said E. Sohier Welch, and the said Sylvester Brown, their heirs and assigns, all the estate, right, title, interest and property, claim and demand whatsoever I, the said Frank Huntington Beebe, now have or may hereafter acquire of, in or to any and all of the estate of my brother, E. Pierson Beebe, which shall pass to me either as a legatee or devisee under his will or shall pass to me under the laws of descent or distribution as one of his heirs-at-law and next-of-kin in case he shall decease intestate.' The only property coming within this description was the property which Frank H. Beebe acquired after the death of E. Pierson Beebe by virtue of the residuary clause of the will of E. Pierson Beebe. This instrument of February 13, 1924, contained no warranty or covenant or any statutory language operating as a warranty or covenant, and no consideration was paid to Mr. Beebe by the grantees or any beneficiary. The trustees named did not then receive any property or execute any instrument accepting the trusts or promising to do so.

25. On August 8, 1926, E. Pierson Beebe died. Frank H. Beebe was abroad; but although immediately notified of his death, did not return until the time he had planned, several weeks later. In October, 1926, after his return, he was advised that the instrument which he had executed in 1924 was ineffective to create a trust of his brother's property. Mr. Beebe stated that he was as anxious as ever to be relieved of the care of this property, and to tie it up so that he could tell persons importuning him that he had no power to touch it. He consequently executed an instrument confirming the trust, but suggested that as it was a family matter and he wished to have the legal right to have a voice in the management of the property, he wished to be added as a trustee himself. He also made it clear that he wished a share of the commissions as trustee of this property. He stated that he did not expect to take an active part in the

management of this trust. Appropriate papers were executed and the property was in 1926 and 1927 turned over to the three trustees, Mr. Welch, Mr. Brown and Mr. Beebe, who administered it in accordance with the terms of the trust.

26. Copies of the instruments relating to this trust, executed on February 13, 1924 and on October 22, 1926, are in evidence as Plaintiffs' Exhibits 7 and 8. Each was recorded in the Registry of Deeds in Suffolk County, Massachusetts, on October 23, 1926, and also with the Registry of Probate of that county in 1930, and the trustees rendered to the Probate Court of that county annual accounts which were approved. The instrument of February 13, 1924, had not been recorded anywhere until October 23, 1926.

27. In 1926 and 1927 E. Sohier Welch, Sylvester Brown and Frank H. Beebe, as trustees, received the property to which Frank H. Beebe became entitled as one of the residuary legatees under the will of E. Pierson Beebe. These three, up to the time of the death of Frank H. Beebe, and Welch and Brown since then, have been holding that property or the reinvestments thereof as trustees and have handled it in accordance with the terms of the two instruments executed by Mr. Beebe on February 13, 1924 and October 22, 1926, of which copies are in evidence as Exhibit 7. They have rendered accounts to the Probate Court of Suffolk County, filed copies of these instruments with the Register of that court, and these accounts from time to time have been allowed."

"30. Until two or three months before his death, with the exceptions hereafter mentioned, Mr. Beebe had enjoyed good health and had continually maintained his interest in his place at Falmouth, in music, and in art; he was always cheerful; and there was no evidence that he was concerned with the thought of death or said anything indicating that he thought that he was going to die soon or entertained any apprehension of death.

31. In the summer of 1922, while he was in London, Mr. Beebe consulted a physician who told him that some time he might have to have an operation to remove his prostate gland.

After Mr. Beebe's return to this country, he continued his life and activities in the same way that he had before. The physician in London had given him a catheter to use if he had trouble, and he had not used it at any time. Mr. Beebe consulted his own physician, Dr. Allen, during the fall of 1923, who found his prostate partially obstructed and prescribed an ordinary simple treatment. The necessity for an operation was not indicated until the last week in February, 1924, when Dr. Allen told him that he should be operated on soon to save a worse condition, and that if this was done, there would be no particular occasion for worry and that the worst would probably be several weeks in the hospital. Dr. Allen did not indicate the possibility of a fatal result, and told Mr. Beebe that the situation would not be serious if the operation was done without delay by a competent physician.

32. On February 24, 1924, Mr. Beebe visited a surgeon, Dr. Quinby, and on the next day Mr. Quinby called on Mr. Beebe. On one of these days Dr. Quinby advised Mr. Beebe to have his prostate removed. Mr. Beebe's trouble at that time was not acute, and as Dr. Quinby said, the operation then was 'a matter of election'.

33. Dr. Quinby told Mr. Beebe that he was an unusually good risk, and told him (as was the fact) that he had participated in part of a series of operations at the Johns Hopkins Hospital at Baltimore in which there had been operations removing prostate glands in over 140 cases without a single death, these patients not being picked, but being all of those who came to the hospital during that time."

"35. At the hospital Mr. Beebe was put to bed to rest, and after five days of that Dr. Quinby found that his condition was entirely satisfactory. During this period and at all times before the operation, Mr. Beebe showed or expressed no apprehension over the result, but continued to make plans for the future, including planting and planning for improvements on the Falmouth estate and the reservation of tickets for concerts.

Dr. Quinby operated on Mr. Beebe, removing his prostate gland, on March 5, 1924."

"40. Plaintiffs' Exhibits 1 and 2 are good photographs of Mr. Beebe taken in his garden at Falmouth in August, 1932. Plaintiffs' Exhibit 11 is a good protograph of Mr. Beebe taken earlier. His appearance at the time he executed the instruments on February 13, 1924, was substantially the same as shown in Exhibit 11."

"42. At no time in 1924 or 1926 did Mr. Beebe have any particular concern about death.

43. At the time of executing the instruments in February, 1924, Frank H. Beebe did not have a particular concern of death giving rise to a definite motive for executing those instruments.

44. The thought of death was not an impelling cause of the making of any of the five trusts mentioned above created by Mr. Beebe.

45. At the time of executing the instrument of October 22, 1926, Frank H. Beebe did not have a particular concern about death giving rise to a definite motive for creating a trust on that date."

"47. The execution of the instrument of February 13, 1924, by Frank H. Beebe sprang from motives other than the thought of death.

48. The trust created by the instrument of October 22, 1926, sprang from motives other than the thought of death."

"51. The impelling causes of executing the instruments purporting to create trusts of property to which he might become entitled or to which he later became entitled from the estate of Pierson Beebe was to prevent the cares of the management of that property from falling entirely upon Frank H. Beebe and to put that property in the hands of trustees so that he could tell importuning friends and relatives that he could not touch it."

"60. The instrument executed by Frank H. Beebe dealing with property from the estate of E. Pierson Beebe, which was

executed by Frank H. Beebe on February 13, 1924, was not executed in contemplation of the death of Frank H. Beebe.

61. The trust which Frank H. Beebe attempted to create by said instrument was not intended to take effect in possession or enjoyment at or after the death of Frank H. Beebe.

62. The trust created by instrument dated October 22, 1926, was not created by Frank H. Beebe in contemplation of his death.

63. The trust created by instrument executed by Frank H. Beebe on October 22, 1926, was not intended to take effect in possession or enjoyment at or after the death of Frank H. Beebe.

64. All interest in and power of control over the corpus of the trust created on October 22, 1926, passed irrevocably from Frank H. Beebe when such corpus was transferred from him to the trustees, notwithstanding the fact that he retained a life interest in the income."

At the trial the plaintiffs filed a motion for judgment in the sum of $553,818.94, with interest thereon at the rate of six percent per annum from May 2, 1935, to the date of judgment. The court denied said motion and, at the trial, noted the plaintiffs' exception to its denial thereof.

At the trial the court handed down an opinion which contained certain findings of fact and conclusions of law. The plaintiffs excepted to certain findings and rulings mentioned hereafter and the court, at the trial, noted the plaintiffs' exception to each of the following:

On page 7 of the opinion, to this finding:

"Whether or not this instrument"—that being the conveyance of February 13, 1924, relating to the E. Pierson Beebe estate—"was a valid trust by reason of the fact that the corpus disposed of in the trust instrument could not accrue to the decedent until after the death of E. Pierson Beebe is not now important, as after the death of E. Pierson Beebe the decedent ratified and confirmed the original trust instrument, making no change whatsoever in its provisions."

In the conclusions; to the following:

On page 10: ". . . a close examination of the facts indicates that in the present case the decedent was actuated by a motive or an intent other than to make a present complete and outright gift."

On the same page: "It is brought within the statute if, from the context of the instrument and the facts surrounding it, it can be found that the purposes actuating the settlor were to make what was in effect a testamentary disposition."

On page 11 the following sentence: "Such a purpose", that is, to relieve the decedent of the burdens of management, "while equally consistent with life or death, does not evince an intent to make a then present gift of the property to others."

On the same page the sentence: "The fact that he had himself appointed a trustee in order to take advantage of the commissions accruing to the trustees indicates his unwillingness to part during his life with any of the earnings of that estate directly or indirectly."

On the same page this sentence: "The creation of a trust, and the placing of title to the property in the trustees for these purposes, while equally consistent with life or death, is not persuasive of a desire to make a then present complete and outright gift."

On page 12 of the opinion, this sentence: "Having accomplished his purposes, he took one step more, and in the same instrument made provisions for the distribution of this fund and its income to take effect after his death."

On the same page this sentence: "That the decedent chose an instrument designed, not only to accomplish the purposes that he had in mind, but well designed to relieve his estate from estate taxes to the extent of that fund, and an instrument which disposed of that property after his death, strongly indicates a transfer that was not only testamentary in character, but intended to take effect in possession or enjoyment after his death."

On page 13 this sentence: "In the present case the dominant motive seems to be the retention of the income for the life of

the settlor, and the incidental setting up of a trust to accomplish this purpose."

On the same page, the following extract from another sentence: ". . . when he took the added step of disposing of this legacy as an incident to the vehicle that he had chosen to accomplish his purposes, I cannot believe that in taking that additional step he intended to do other than to make a testamentary disposition, or that in taking any of the steps, he intended to divest himself of the possession or enjoyment of the legacy, or transfer such possession or enjoyment to others at any time prior to his death."

On the same page this sentence: "I therefore rule that the transfer and trust involved in the Frank H. Beebe trust was testamentary in character made in contemplation of death, and intended to take effect in possession or enjoyment after the death of the testator."

On page 14 this sentence: "In view of the foregoing it is unnecessary to consider either the retroactivity or the constitutionality of the amendments to Section 302 (c) of the Revenue Act of 1926 made in 1931 or 1932."

On August 18, 1936, the defendant filed a motion to amend the findings of fact, reading as follows:

"Now comes the defendant by his attorney, Francis J. W. Ford, United States Attorney for the District of Massachusetts, and moves that the court amend its findings of fact, as follows:

"To eliminate from the findings of fact announced by the court the following sentence in the next to the last paragraph of the findings of fact on page 7 of the typewritten opinion, that sentence reading as follows:

His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, and (2) to avoid the importunities of his family and his friends.

"To substitute for the said sentence eliminated the following

His purposes in establishing the trust itself were (1) to re-

lieve himself of the burdens of management of this legacy, (2) to avoid the importunities of his family and his friends, (3) to relieve his estate from estate taxes, (4) to make testamentary dispositions, (5) to make a transfer in trust in contemplation of death, and (6) to make a transfer in trust to take effect in possession or enjoyment after his death.

The decedent was actuated by a motive or an intent other than to make a present, complete and outright gift.

I find that the purposes above set out bearing the numbers 3 to 6, inclusive, were substantial and controlling motives."

This motion was heard by the court and, after argument, was denied on October 13, 1936.

The court granted written motions extending the time of the plaintiffs for filing a bill of exceptions as follows:

On August 3, 1936, the court granted the plaintiffs' motion to extend the time for filing their bill of exceptions to and including September 7, 1936, and on August 31, 1936, the court granted the plaintiffs' motion to extend the time for filing their bill of exceptions to and including October 7, 1936.

Also, on August 31, 1936, the court allowed the following motion of the plaintiffs:

"Now come the plaintiffs in the above-entitled case and move that the court enter an order in the form annexed hereto extending the case for certain purposes to the September, 1936, Term."

The order referred to is as follows:

"In the above-entitled cause it is hereby ordered that said cause be continued to the September, 1936, Term of this court for the purpose of settling, allowing, signing and filing bills of exceptions of each party and the entry of judgment, such bills of exceptions to be settled, allowed and signed within such time as the court shall hereafter fix."

On October 6, 1936, the court granted the plaintiffs' motion to extend the time for settling and allowing their bill of exceptions to and including November 7, 1936, and on November 4 the court granted a motion extending such time to November 30.

On September 12 the plaintiffs filed a bill of exceptions, and on November 30 the plaintiffs filed amendments to said bill of exceptions.

The plaintiffs, being aggrieved by the refusal of the court to grant their motion for judgment and by each of the foregoing denials of their requests for findings of fact and rulings of law, and the action of the court in making each of those findings of fact and rulings of law set forth above, to which the exceptions of the plaintiffs were noted, bring this bill of exceptions and pray that it be allowed.

E. SOHIER WELCH AND SYLVESTER BROWN,
Executors under the Will of
Frank Huntington Beebe,
by their Attorneys,
JOHN L. HALL,
CLAUDE R. BRANCH,
HENRY HIXON MEYER,
EDWARD C. THAYER,
by CLAUDE R. BRANCH.

11–30–36. Allowed. GEO. C. SWEENEY.

See plaintiffs' bill of exceptions.

G. S. C.

PLAINTIFFS' EXHIBIT 7.

DEED OF TRUST, DATED FEBRUARY 13, 1924 AND CONFIRMATORY DEED, DATED OCTOBER 22, 1926.

Know all Men by these Presents, that I, Frank Huntington Beebe, of Falmouth, in the County of Barnstable and Commonwealth of Massachusetts, in consideration of One Dollar and other good and valuable considerations to me paid by E. Sohier Welch, of Weston, in the County of Middlesex, and Sylvester Brown, of Braintree, in the County of Norfolk, and said Commonwealth, the receipt is hereby acknowledged, do hereby grant, remise, release, assign, transfer and convey unto the said E. Sohier Welch and the said Sylvester Brown, their heirs and assigns, all the estate, right, title, interest, property, claim and demand whatsoever I, the said Frank Huntington Beebe,

now have or may hereafter acquire of, in or to any and all of the estate of my brother, E. Pierson Beebe, which shall pass to me either as a legatee or devisee under his will or shall pass to me under the the laws of descent or distribution as one of his heirs-at-law and next of kin in case he shall decease intestate.

To have and to hold the same, together with all rights, privileges and appurtenances to the same belonging, to the said E. Sohier Welch and the said Sylvester Brown, and their heirs, executors, administrators and assigns, in trust, nevertheless, to hold, manage and invest the same until the decease of the survivor of myself, the said Frank Huntington Beebe, my nephew, George Stanley Fiske, hereinafter named, my niece, Esther Fiske Hammond, hereinafter named, and Gardiner Greene Hammond, George Fiske Hammond, Frances L. Hammond, Elizabeth C. Hammond, Esther Beebe Hammond and Mary C. Hammond, children of my said niece, and to pay the net annual income therefrom, in quarter-yearly payments, to me, the said Frank Huntington Beebe, during my lifetime, and from and after my decease to pay the net annual income therefrom, in quarter-yearly payments, as follows: A one-third part thereof to my said nephew, George Stanley Fiske, during his lifetime, and thereafter to and among his issue, if any, living at the respective dates of payment of income, such issue to take by right of representation, and in default of such issue, such income shall be added ratably to the other shares of income then being paid from said trust estate; a one-third part thereof to my said niece, Esther Fiske Hammond, during her lifetime and thereafter to and among her issue, if any, living at the respective dates of payment of income, such issue to take by right of representation, and in default of such issue, such income shall be paid to my said nephew, if living, otherwise, to his issue living at the respective dates of payment of income; a one-third part thereof to and among the issue, if any, of my said niece, Esther Fiske Hammond, living at the respective dates of payment of income, such issue to take by right of representation, and in default of such issue, such income shall be added ratably to the other shares of income then being paid from said trust estate.

Upon the decease of the last survivor of myself, the said Frank

Huntington Beebe, my said nephew, George Stanley Fiske, my said niece, Esther Fiske Hammond, and said Gardiner Greene Hammond, George Fiske Hammond, Frances L. Hammond, Elizabeth C. Hammond, Esther Beebe Hammond and Mary C. Hammond, children of my said niece, the principal of said trust estate, as it shall then exist, shall be transferred, paid over and conveyed, free and discharged from all trusts, as follows: A one-third part thereof to the then living issue, if any, of my said nephew, George Stanley Fiske, such issue to take by right of representation, and a two-thirds part thereof to and among the then surviving issue, if any, of my said niece, Esther Fiske Hammond, such issue to take by right of representation. In case there shall not be any issue of my said nephew living at the date of the termination of said trust, the share such issue would have taken, if then living, shall be transferred, paid over and conveyed, free and discharged from all trusts, to the then living issue, if any, of my said niece, such issue to take by right of representation. In case there shall not be any issue of my said niece living at the date of the termination of said trust, the share such issue would have taken, if then living, shall be transferred, paid over and conveyed, free and discharged from all trusts, to the then living issue, if any, of my said nephew, such issue to take by right of representation. In case, at the date of the termination of said trust, there shall not be any issue either of my said nephew or of my said niece then living, the then Trustees hereunder shall pay over, transfer and convey, free and discharged from all trusts, the principal of said trust property then held in trust, to and among those persons who would have been entitled to receive the same according to the laws of the Commonwealth of Massachusetts, then in force, if it had been the absolute property of myself, the said Frank Huntington Beebe, and I had deceased intestate, a resident of said Commonwealth, upon the date of the termination of this trust.

The number of the Trustees hereunder shall be kept up to two, and whenever any vacancy shall occur, I direct the surviving or remaining Trustee, for the time being whether original or substituted, with my assent in writing during my lifetime, and thereafter with the assent in writing of the majority of the persons having the beneficial interest in said trust estate then owned by adults, to appoint

in writing some person whose vocation is the management of trust estates to act as co-Trustee with the surviving or remaining Trustee, which new Trustee shall have all the rights and perform all the duties of the Trustee ceasing to act, and the said trust property shall vest in such new Trustee in like manner as it had vested or would have vested in the Trustee in whose place he is substituted and such new Trustee shall have the same powers, rights and duties and the same title to the trust estate as if he had been originally appointed. In case a vacancy shall exist in the office of Trustee hereunder for a consecutive period of three months, the judge for the time being of the Probate Court for said Barnstable County shall, upon the written request of such surviving or remaining Trustee or of any beneficiary of said trust, appoint some person whose vocation is the management of trust estates to act as co-Trustee with the surviving or remaining Trustee, and any Trustee so appointed shall have the same powers, duties and estate as if appointed as above provided by the surviving or remaining Trustee with the assent of a beneficiary or beneficiaries, and in default of such appointment, a co-Trustee to act with the surviving or remaining Trustee shall be appointed in the manner provided by law, and any Trustee so appointed shall be exempt from giving any surety or sureties upon his official bond as such Trustee.

Each of the Trustees at any time acting hereunder shall be liable for his own receipts, payments and wilful defaults and for nothing else, and one shall not be liable for the other, nor for errors of judgment.

During the continuance of a vacancy the surviving or remaining Trustee shall have every power herein given to the two Trustees, but intending that there always shall be two Trustees acting under this instrument.

The decision of the Trustees hereunder as to any questions arising between capital and income shall be final and binding on all persons then or thereafter interested.

The income herein given shall not be alienable by any beneficiary, either by assignment or by any other method, and the said income shall not be subject to be taken by his or her creditors by any process whatever.

The Trustees for the time being under this instrument are authorized and empowered to sell at public or private sale, mortgage, pledge, or lease any portion or the whole of the estate, real or personal, which they may hold under the trusts hereby created, and to execute and deliver good and sufficient deeds and other instruments to convey and transfer the same. And whenever it shall become necessary to make final distribution of any property held in trust under this instrument, the Trustees for the time being shall have like authority for the purpose of such distribution to sell and convert into money the whole or any portion of such property whether real or personal.

Upon all sales by the Trustees under this instrument the purchasers shall not be bound to see to the application of the purchase money.

In case the surviving or remaining Trustee at any time hereunder shall appoint a new Trustee, the instrument in writing making such appointment shall certify that the vocation of the new Trustee is the management of trust estates, and such instrument shall be conclusive evidence of the matters therein stated, binding all persons then or thereafter interested, other than as beneficiaries of the trust.

The word "Trustees" wherever used in this instrument shall be construed and taken to mean the Trustees or Trustee for the time being whether original or substituted.

In witness whereof, I, the said Frank Huntington Beebe, have hereto set my hand and seal this Thirteenth day of February, A. D. Nineteen Hundred and twenty-four.

FRANK H. BEEBE [SEAL]

In presence of Harry F. Reiser.

Commonwealth of Massachusetts.

Suffolk, ss. Boston, February 13, 1924.

Then personally appeared the above-mentioned Frank Huntington Beebe and acknowledged the foregoing instrument, by him subscribed, to be his free act and deed. Before me,

HARRY F. REISER,

[SEAL] Notary Public.

Know all Men by these Presents That I, Frank Huntington Beebe, of Falmouth in the County of Barnstable and Commonwealth of Massachusetts, being unmarried, the grantor named in the foregoing deed, hereby ratify and confirm the same, and, for consideration paid, hereby grant unto E. Sohier Welch of Weston in the County of Middlesex and said Commonwealth, and Sylvester Brown of Braintree in the County of Norfolk and said Commonwealth, all the estate, right, title, interest, property, claim and demands whatsoever that I have acquired in or to any and all of the estate of my brother, E. Pierson Beebe, late of said Falmouth, deceased.

To have and to hold the same, together with all rights, privileges and appurtenances to the same belonging, to the said E. Sohier Welch and the said Sylvester Brown and their heirs, executors, administrators and assigns, in trust nevertheless for all the purposes and with all of the powers set forth in the foregoing instrument.

In witness whereof I, the said Frank Huntington Beebe, have hereunto set my hand and seal this Twenty-second day of October, A. D. 1926. FRANK H. BEEBE [SEAL]

Commonwealth of Massachusetts.

Suffolk, ss. October 22, 1926.

Then personally appeared the above named Frank Huntington Beebe and acknowledged the foregoing instrument to be his free act and deed, before me, ELEANOR S. MUIR

[SEAL] Notary Public

From the aforementioned judgment, the plaintiffs claimed an appeal to the United States Circuit Court of Appeals on the Eighth day of February, A. D. 1937, which was allowed by the court on the same day.

PLAINTIFFS' ASSIGNMENT OF ERRORS.

[Filed February 8, 1937.]

The plaintiffs, E. Sohier Welch and Sylvester Brown, executors u/w Frank Huntington Beebe, respectfully specify the following assignments of error with respect to the proceedings had in the above-entitled cause and the judgment entered therein on February 8, 1937:

1. That the court erred in denying the plaintiffs' motion for judgment in the sum of $553,818.94 and interest thereon at the rate of 6 percent per annum from May 2, 1935, to the date of judgment.

2. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "A transfer is not in contemplation of death within the meaning of the Revenue Acts applicable to estate tax on the estate of Frank H. Beebe unless the thought of death, other than the general expectation of death which all entertain, is the impelling cause of the transfer."

3. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "A transfer is not in contemplation of death within the meaning of said Revenue Acts if it is a gift *inter vivos* springing from a motive different from such thought of death."

4. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "The instrument dated February 13, 1924, copy of which is in evidence as part of Exhibit 7, was not executed by Frank H. Beebe in contemplation of his death."

5. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "An attempted transfer of property which one expects or hopes to receive from the estate of a person who is still living upon the death of that person is inoperative in the absence of actual consideration or a deed containing a warranty or covenant of some kind or language having the effect of a warranty or covenant."

6. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

> "No trust or valid transfer of property was created by the execution and delivery of the instrument executed by Frank H. Beebe on February 13, 1924, copy of which is part of Exhibit 7."

7. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"A valid trust of the property to which Frank H. Beebe became entitled by virtue of the residuary clause of the will of E. Pierson Beebe was created by virtue of the instrument of confirmation executed by Frank H. Beebe on October 22, 1926."

8. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"The gifts made by the instrument executed October 22, 1926, were completely vested beyond recall before the passage of the Joint Resolution of March 3, 1931."

9. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"Under the trust created by instrument executed October 22, 1926, interests vested immediately in the trust estate created thereby, not only in Frank H. Beebe, but in various other beneficiaries of said trust, and said interests vested more than six years before the death of Frank H. Beebe."

10. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"This trust created on October 22, 1926, was not created by Frank H. Beebe in contemplation of his death."

11. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"This trust created by Frank H. Beebe on October 22, 1926, took effect in possession or enjoyment during the lifetime of Frank H. Beebe, more than six years before his death."

12. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"This trust created by Frank H. Beebe on October 22, 1926, was not intended to take effect in possession or enjoyment at or after his death."

13. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"The Joint Resolution of March 3, 1931, amending the Revenue Act of 1926, and any re-enactment thereof, should be construed not to include transfers made prior to March 3, 1931."

14. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"If said Joint Resolution of March 3, 1931, or any re-enactment thereof, is construed to include any of the trusts involved in this case, it is to that extent invalid and void as in conflict with the provisions of Article V of the Amendments to the Constitution of the United States, inasmuch as said provisions, if applied to any of said transfers, would deprive the estate of Frank H. Beebe and the executors thereof of property without due process of law."

15. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"In computing the federal estate tax on the estate of Frank H. Beebe, none of the property of the trust created by him to hold property distributed to him under the will of E. Pierson Beebe should be included as part of the gross estate."

16. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"Although the determination of a deficiency by the Commissioner of Internal Revenue is *prima facie* correct, the presumption is open to be overcome by adequate testimony, and the burden upon the taxpayer seeking to recover the amount paid as such a deficiency is only the ordinary burden of sustaining his case by a fair preponderance of the credible evidence. If, in such a case, the plaintiff establishes his case by a fair preponderance of the credible evidence introduced at the trial, the fact that the Commissioner has made a determination against the taxpayer is entitled to no weight."

17. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"Section 403 (a) of the Revenue Act of 1921, which was in effect on February 13, 1924, provided that in determining the value of the net estate for the purpose of the estate tax there shall be deducted:

'(2) An amount equal to the value of any property forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise or inheritance or which can be identified as having been acquired in exchange for property so received.'

A similar provision appears in all subsequent Revenue Acts."

18. That the court erred in so far as it refused to grant the following request of the plaintiffs for ruling of law:

"Judgment should be ordered for the plaintiffs in the sum of $553,818.94, with interest thereon at the rate of 6 percent per annum from May 2, 1935, to the date of judgment."

19. That the court erred in ruling in its opinion:

"Whether or not this instrument [that being the conveyance of February 13, 1924, relating to the E. Pierson Beebe estate] was a valid trust by reason of the fact that the corpus disposed of in the trust instrument could not accrue to the decedent until after the death of E. Pierson Beebe is not now important, as after the death of E. Pierson Beebe, the decedent ratified and confirmed the original trust instrument, making no change whatsoever in its provisions."

20. That the court erred in ruling in its opinion:

". . . a close examination of the facts indicates that in the present case the decedent was actuated by a motive or an intent other than to make a present complete and outright gift."

21. That the court erred in ruling in its opinion:

"It is brought within the statute if, from the context of the instrument and the facts surrounding it, it can be found that the purposes actuating the settlor were to make what was in effect a testamentary disposition."

22. That the court erred in ruling in its opinion:

"Such a purpose [that is, to relieve the decedent of the burdens of management] while equally consistent with life or death, does not evince an intent to make a then present gift of the property to others."

23. That the court erred in ruling in its opinion:

"The fact that he had himself appointed a trustee in order to take advantage of the commissions accruing to the trustees indicates his unwillingness to part during his life with any of the earnings of that estate directly or indirectly."

24. That the court erred in ruling in its opinion:

"The creation of a trust, and the placing of title to the property in the trustees for these purposes, while equally consistent with life or death, is not persuasive of a desire to make a then present complete and outright gift."

25. That the court erred in ruling in its opinion:

"Having accomplished his purposes, he took one step more, and in the same instrument made provisions for the distribution of this fund and its income to take effect after his death."

26. That the court erred in ruling in its opinion:

"That the decedent chose an instrument designed, not only to accomplish the purposes that he had in mind, but well designed to relieve his estate from estate taxes to the extent of that fund, and an instrument which disposed of that property after his death, strongly indicates a transfer that was not only testamentary in character, but intended to take effect in possession or enjoyment after his death."

27. That the court erred in ruling in its opinion:

"In the present case the dominant motive seems to be the retention of the income for the life of the settlor, and the incidental setting up of a trust to accomplish this purpose."

28. That the court erred in ruling in its opinion:

". . . when he took the added step of disposing of this legacy as an incident to the vehicle that he had chosen to accomplish his purposes, I cannot believe that in taking that additional step he intended to do other than to make a testamentary disposition, or that in taking any of the steps, he intended to divest himself of the possession or enjoyment of the legacy, or transfer such possession or enjoyment to others at any time prior to his death."

29. That the court erred in ruling in its opinion:

"I therefore rule that the transfer and trust involved in the Frank H. Beebe trust was testamentary in character made in contemplation of death, and intended to take effect in possession or enjoyment after the death of the testator."

30. That the court erred in ruling in its opinion:

"In view of the foregoing it is unnecessary to consider either the retroactivity or the constitutionality of the amendments to Section 302 (c) of the Revenue Act of 1926 made in 1931 or 1932."

Wherefore the plaintiffs, appellants, pray that the judgment of said District Court be reversed, and that the cause be remanded, and that the District Court be directed to enter judgment for the plaintiffs in the sum of $553,818.94, with interest thereon at the rate of 6 percent per annum from May 2, 1935, to the date of judgment.

By their Attorneys,

JOHN L. HALL, Jr.,
CLAUDE R. BRANCH,
CHOATE, HALL & STEWART.

On the eighth day of February, A. D. 1937, the sum of two hundred fifty dollars ($250) was deposited in lieu of bond on appeal by the plaintiffs.

STIPULATION FOR TRANSMISSION OF EXHIBITS.

[Filed February 8, 1937.]

It is hereby stipulated and agreed by and between the parties in the above-entitled cause that the several exhibits introduced in evidence, designated as 1 through 14 inclusive, and A through I inclusive, being the exhibits referred to in the plaintiffs' bill of exceptions allowed in said cause, need not be reproduced in the printed record (with the exception of exhibit numbered 7), but may be transmitted by the clerk of the United States District Court for the District of Massachusetts to the United States Circuit Court of Appeals for the First Circuit as original exhibits as part of the record in said case.

E. SOHIER WELCH AND SYLVESTER BROWN,
Executors of the Will of F. Huntington Beebe,
by their Attorneys,
CLAUDE R. BRANCH,
CHOATE, HALL & STEWART.

FRANCIS J. W. FORD, *United States Attorney,*
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

A citation on appeal was issued on February 8, 1937, being made returnable in the United States Circuit Court of Appeals on March 10, 1937. Service of said citation was duly acknowledged on behalf of the defendant.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States, for the District of Massachusetts, do hereby certify that the foregoing are the transcript of the record on the appeal of the plaintiffs, includ-

ing true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 6469, LAW DOCKET.

E. SOHIER WELCH AND SYLVESTER BROWN, EXECUTORS OF THE WILL OF FRANK H. BEEBE, PLAINTIFFS,

v.

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR OF INTERNAL REVENUE, DEFENDANT,

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal and the citation on appeal with acknowledgment of service of citation on appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this seventeenth day of March, A. D. 1937.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, March 18, 1937, is here omitted. A. I. CHARRON, *Clerk.*]

On February 27, 1937, the following stipulation was filed and approved:

The parties in the above cause have stipulated that all but one of the exhibits in the case may be transmitted to the court and need not be reproduced in the record. It is felt that none of the other exhibits are of sufficient importance so that reprinting them would be desirable.

It is understood that if either counsel desires to refer to any of these exhibits, he will reproduce such exhibits, or parts thereof in his brief.

CLAUDE R. BRANCH,
Attorney for Appellants.
FRANCIS J. W. FORD,
United States Attorney.
By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney,
Attorney for Appellee.

On April 23, 1937, this cause came on to be heard and was fully heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

Thereafter, to wit, on the first day of June, A. D. 1937, the following Opinion of the Court was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3235. October Term, 1936

E. SOHIER WELCH ET AL., EXECUTORS, PLAINTIFFS, APPELLANTS,

v.

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE

Appeal from the District Court of the United States for the District of Massachusetts

Before WILSON, MORTON, and MORRIS, JJ.

Opinion of the Court

June 1, 1937

WILSON, *J.* This is an appeal from a judgment of the District Court of Massachusetts in an action by the executors of the will of Frank H. Beebe to recover federal estate taxes to the amount of $363,818.94 paid to the defendant as former acting Collector of Internal Revenue.

The issues arise out of the construction of a trust instrument executed by the decedent in 1924 and affirmed in 1926. It was contended by the Government and sustained by the Commissioner that the transfer and trust in question was entered into in contemplation of death, was testamentary in character, and was intended to take effect in possession and enjoyment at or after the death of the decedent.

The case before the District Court was tried without a jury, a jury being waived. The plaintiffs requested certain special findings of fact and rulings of law during the course of the trial.

Owing to language of the sections of the statute, 700 R. S., authorizing the trial of a law action without the intervention of a jury according to Sec. 649 R. S. and its construction by the courts, an appellate court cannot have recourse to the opinion of the trial court for findings of fact, and to general conclusions of law to supplement any rulings of law by the court at the trial. A general finding in an opinion has the effect of a jury verdict and an exception thereto does not bring up the evidence. Fleischmann Construction Co. v. United States, 270 U. S. 349; Arthur C. Harvey Co. v. Malley, 288 U. S. 415; United States v. Smith, 39 Fed. (2d) 851; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121.

In the instant case, however, the District Court in its opinion under a heading, "Findings of Fact", made certain findings of fact and refused the plaintiffs' request for special findings, except as the findings are made a part of the opinion. While making special findings of fact a part of the opinion may be a questionable practice (see United States v. Esnault-Pelterie, 299 U. S. 201, 206; Crocker v. United States, 240 U. S. 74, 78; United States v. Wells, 283 U. S. 102, 120), there appear to be no issues of consequence between the parties as to the facts set forth under the "Findings of Fact" in the opinion, which are substantially as follows:

On April 8, 1919, Frank H. Beebe and E. Sohier Welch were appointed guardians of the person and estate of E. Pierson Beebe, a brother of the decedent, and continued as such until his death on August 8, 1926. At the time of the appointment of guardians the estate of E. Pierson Beebe was worth between six and seven million dollars.

As a co-guardian of E. Pierson Beebe, the decedent had the custody of a will which had been drawn by E. Pierson Beebe prior to his having been declared incompetent. Under this will the decedent was to receive one-half of the E. Pierson Beebe estate.

Upon assuming the co-guardianship of the estate of E. Pierson Beebe, and the co-trusteeship of the estate of the decedent's father, James M. Beebe, the decedent retained the old offices and clerks of E. Pierson Beebe at No. 6 Beacon Street, Boston. At first he became active in the management of the two trusts, frequently consulting Welch with regard to management and investment. The decedent was enjoying excellent health and was a man of wealth in his own right. Up to this time his interests had not been those of a business man. He loved art, music, flowers and pictures; was a

regular patron of the opera and concerts; spent much of his time in the woods among the trees and flowers, and anually planned the flower garden for his huge summer estate at Falmouth. He was not interested in the business world and many times expressed a distaste for it.

After a short time he became dissatisfied with the burdens he had assumed, and in April of 1921, desiring to be relieved of them, and at the suggestion of the plaintiff Welch, secured the services of Sylvester Brown, who became the office manager of the decedent. Brown's activities were principally in connection with the estate of James M. Beebe, and the co-guardianship of the estate of E. Pierson Beebe. Gradually he took over nearly all of the decedent's work as co-trustee and co-guardian.

The decedent was fond of travel. In the summer of 1923, while visiting in England, he had some bladder trouble, consulted a physician, and was catheterized by him. During the last week of February 1924, the decedent consulted his family physician, told him of his experience in London, and of the fact that the English physician had advised him that an operation would be necessary. He was referred by his physician to a specialist. After consultation with the specialist, and about February 29, 1924, he entered a hospital for an operation, and after a period of pre-operative rest, a prostatectomy was performed on March 5th. At that time the decedent was nearing his seventy-first birthday. A short time later a secondary operation was performed. After a normal convalescence, the decedent was discharged from the hospital on April 15, 1924, and, after regaining his strength, continued in good health until shortly before his death on November 29, 1932. Death was due to myocarditis and arteriosclerosis, which had their inception about two months before his death.

Prior to the first of January 1924, the decedent had made modest financial contributions to relatives and persons close to him. Sometime between the 1st and the 15th of January the decedent first discussed with E. Sohier Welch the possibility of creating certain trusts in order that he might be relieved of the importunities of these relatives and friends; and in order that the beneficiaries of his generosity would receive regular payments from the trust rather than the hit or miss gifts that he had previously made to them.

Later the decedent executed four trusts which are referred to as trusts A, B, C, and D. On the same day he also attempted to create a fifth trust, which will hereinafter be referred to as the Frank H. Beebe trust, and which will be separately discussed.

Trusts A, B, C, and D are not concerned in this case, as they were held by the District Court not to have been made in contemplation of death.

On February 13, 1924, the same date on which trusts A, B, C, and D were carved out of his own estate, the decedent attempted to create a fifth trust, previously referred to as the Frank H. Beebe trust. This trust fund was to be derived from a legacy contained

in the will of E. Pierson Beebe, who was then living, but then under guardianship as an incompetent. Under the will made before he was declared insane he had left about one-half of his estate to the decedent, who attempted to create a trust to include the expectant legacies, reserving to himself the income for life. After his death the income was to be divided one-third to a nephew, George Stanley Fiske, during his lifetime, and thereafter to his issue; one-third to his niece, Esther Fiske Hammond, during her lifetime, and thereafter to her issue; and one-third part to the issue of Esther Fiske Hammond, and on default of any such issue the income was to be added ratably among the other beneficiaries.

He made further provision on the death of these beneficiaries. This instrument contained no warranty or covenant, nor any statutory language operating as a warranty or covenant, and no consideration was paid by the grantees or the beneficiaries to the decedent. Whether or not this instrument was a valid trust by reason of the fact that the corpus disposed of in the trust instrument could not accrue to the decedent until after the death of E. Pierson Beebe is not now important, as after the death of E. Pierson Beebe, acting on the advice of an attorney, a confirmation and ratification of this instrument was made, the decedent ratified and confirmed the original trust instrument, making no change whatsoever in its provisions, as to the disposal of the corpus.

At the time this was done the decedent caused the number of trustees to be changed from two, as written in the original instrument, to three, and caused himself to be elected one of the trustees. Among the findings of fact by the District Court is the following: *His purposes in having himself appointed a trustee were (1) to have the name of Beebe connected with the trust, and (2) because he wanted part of the commissions. His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, and (2) to avoid the importunities of his family and his friends.* (Italics supplied.) All of the beneficiaries named in it were either those, or their issue, who on his death would become his heirs.

After the opinion of the District Court was rendered, the defendant by his attorney, Francis J. W. Ford, United States Attorney for the District of Massachusetts, moved that the court amend its findings of fact as follows:

"To eliminate from the findings of fact announced by the court the following sentence in the text to the last paragraph of the findings of fact on page 7 of the typewritten opinion, that sentence reading as follows:

"'His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, and (2) to avoid the importunities of his family and his friends.'

"To substitute for the said sentence eliminated the following: 'His purposes in establishing the trust itself were (1) to relieve himself of the burdens of management of this legacy, (2) to avoid the im-

portunities of his family and his friends, (3) to relieve his estate from estate taxes, (4) to make testamentary dispositions, (5) to make a transfer in trust in contemplation of death, and (6) to make a transfer in trust to take effect in possession or enjoyment after his death.

"'The decedent was actuated by a motive or an intent other than to make a present, complete, and outright gift.

"'I find that the purposes above set out bearing the numbers 3 to 6, inclusive, were substantial and controlling motives.'"

This motion was heard by the court, and after argument was denied on October 13, 1936.

Notwithstanding the findings of fact and the refusal to amend the findings, the District Court ruled that the transfer and trust involved in the Frank H. Beebe trust was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after the death of the testator.

During the course of the trial, the plaintiffs made the following requests for rulings of law, based on the court's findings of fact, which were denied by the District Court, and which must be held to be inconsistent with the conclusions of the court in its opinion:

(1) The instrument dated February 13, 1924, a copy of which is in evidence, was not executed by Frank H. Beebe in contemplation of death.

(2) The trust created on October 22, 1926, was not created by Frank H. Beebe in contemplation of death.

(3) The trust created by Frank H. Beebe on October 22, 1926, was not intended to take effect in possession or enjoyment at or after his death.

(4) The trust created by Frank H. Beebe on October 22, 1926, took effect in possession or enjoyment during the lifetime of Frank H. Beebe more than 6 years before his death.

(5) In computing the Federal estate tax on the estate of Frank H. Beebe none of the property of the trust created by him to hold property distributed to him under the will of E. Pierson Beebe should be included as a part of the gross estate.

(6) At the trial the plaintiffs filed a motion for judgment in the sum of $553,818.94, with interest thereon at the rate of 6 percent per annum from May 2, 1935, to date of judgment, which motion was denied by the District Court and exceptions were duly noted by the plaintiffs at the trial to the denial thereof.

Certain exceptions were taken by the plaintiffs to portions of the opinion, but in a jury waived case these cannot avail the plaintiffs.

Without entering further into the question of what assignments of error are open to the plaintiffs, Fleischmann Construction Co. v. United States, supra; Wilson v. Merchants' Loan & Trust Co., supra; Arthur C. Harvey Co. v. Malley, supra; United States v. Smith, supra, we think the facts found in the opinion under the heading "Findings of Fact" were intended by the District Court as special findings of fact, from which the rights of the parties under a con-

struction of the trust instrument would follow as a matter of law; and his denial of the plaintiffs' requests for ruling of law in so far as they are inconsistent with his opinion, under their assignments of error, raise the following issues of law for the consideration of this court:

(1) Whether the value of certain property which came from the estate of his brother, E. Pierson Beebe, which was included in the trust created by Frank H. Beebe during his lifetime and known as the "Beebe Trust" should be included in the gross estate of the decedent for purposes of assessing the federal estate tax.

(2) Whether the transfer made by the trust instrument was made by Frank H. Beebe in contemplation of death, and was intended to take effect in possession or enjoyment after the death of the testator.

(3) Whether, regardless of the intention of the creator, Sec. 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Sec. 803 of the Revenue Act of 1932, requires the trust property should be included in the gross estate of the testator, since under the terms of the trust the creator received the entire income of the trust during his lifetime and disposed of the principal of the trust estate.

(4) Whether there was error in denying the plaintiffs' motion for judgment at the close of the trial.

The first two assignments of error may be considered together and raise the issue whether a trust created to relieve the creator of the demands of his relatives and friends, and to dispose of the estate received from his brother after reserving to himself the entire income thereof for life, as a matter of law, renders the transfer by the trust instrument to have been made in contemplation of death and intended to take effect in possession and enjoyment after the death of the creator and testator.

The decisions of the Supreme Court appear to be contrary to this ruling.

In May v. Heiner, 281 U. S. 238, the decedent and creator of the trust transferred properties to a trustee to pay the net income to her husband for life, after his decease to the decedent herself, and after her decease to her children. The court said, page 243:

"The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

Burnet v. Northern Trust Co., 283 U. S. 782 (affirming 41 Fed. (2d) 732); Morsman, Adm'r., v. Burnet, 283 U. S. 783; McCormick et al., Exrs., v. Burnet, 283 U. S. 784; Reinecke, Collector, v. Northern Trust Co., 278 U. S. 339, are to the same effect.

In United States v. Wells et al., Exrs., 283 U. S. 102, 113-120, there is a full discussion of the meaning of this phrase, "in contemplation of death."

In Helvering v. Helmholz, 296 U. S. 93, by the terms of the trust the value of certain stocks was transferred to trustees to pay the dividends of such stocks to the creator and decedent during her life, the remainder to her appointees by will or to her issue. The Supreme Court held that the property so transferred could not be included in the decedent's gross estate, saying in its opinion, page 98:

"The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter, or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. Reinecke v. Northern Trust Co., 278 U. S. 339."

In Poor v. White, 8 Fed. Supp. 995, the settlor conveyed property to trustees under a declaration of trust under the terms of which the trustees were to pay one-half of the net income to her during her lifetime and the remainder to her children until her death, after which the entire trust property was to be divided between her three children.

Judge Brewster of the District Court held that the reservation of a portion of the income to herself during her lifetime did not prevent the transfer from being a completed transfer beyond the reach of the statute, citing May v. Heiner, supra; McCormick et al., Exrs., v. Burnet, supra; Morsman, Adm'r., v. Burnet, Com'r., supra; Burnet, Com'r., v. Northern Trust Co., supra.

The judgment of the District Court was affirmed by this court in 75 Fed. (2d) 235, and by the Supreme Court in 296 U. S. 98.

In Smith et al. v. United States, 16 Fed. Supp. 397, the District Court (Judge Brewster) held that it is well settled that an irrevocable trust in which the donor has reserved the right to enjoy the income is nevertheless a completed transfer.

In the instant case the trust created by Frank H. Beebe was irrevocable. He so understood it. In a letter to a niece he said: "The Messrs. Welch, Brown, and myself are the trustees named in this deed *which is irrevocable* and by its provisions I am only able to use the income from this fund from Uncle Pierson during my lifetime." (Italics supplied.)

It is significant as to the intention of Frank H. Beebe in creating this trust that he was transferring only the legacy which came to him from his brother, that he was a man of large and independent means himself, and that he had no apparent reason for making other than a present, outright, and irrevocable gift.

The case is somewhat complicated by statements in the opinion under the court's "Conclusions" wherein the court held that an examination of the facts in the present case as distinguished from that of Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, indicates that the decedent in this case was actuated by a motive or intent other than to make a present, completed, and outright gift, or that the major motive in creating the trust instrument was to dispose of the estate received from his brother, after having reserved to

himself the entire income from that estate. These may seem like findings of fact which are binding on this court, but we think they are merely conclusions resulting from the court's reasoning from the facts found by the court, but by which reasoning we are not bound.

As the Supreme Court said in United States v. Wells et al., Exrs., at page 120, supra:

"The only difficulty presented by the record is that this statement with respect to the motive of decedent appears in the opinion of the court and not in its findings of fact. We are not at liberty to refer to the opinion for additional findings. The findings of fact of the Court of Claims are to be treated like the verdict of a jury. We cannot add to them, or modify them, but the absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference.

"It is evident that the court did not consider the statements in its opinion, which we have quoted, as additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. In its opinion, the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers was precisely that which the court has thus definitely stated. While, in accordance with proper practice and the rule of this Court, the Court of Claims should have found the ultimate fact, and we do not approve the method it adopted, we are of the opinion that, in view of the findings of fact actually made and the conclusion they import, the judgment should be sustained."

Nor does the reasoning bind this court by which the District Court arrived at its conclusions, that the creator, having accomplished his purpose of evading the burden of managing his estate, as well as the importunities that he found would inevitably follow the ownership of an estate of over $3,000,000, took one stop more and made provisions in the same instrument for disposing of the entire fund after his death, which the court suggests was done to avoid the estate taxes.

To dispose of one's property after the termination of the trust existed as one of the major motives in all the cases above cited, and yet the court held that it did not prevent a present, completed and irrevocable transfer so far as the creator was concerned.

We think it is clear from the facts found and admitted by the pleadings that it does not follow from the trust instrument in this case that it was made in contemplation of death, nor intended only to take effect in enjoyment or possession after the creator's death, but upon the creation of the trust the right of possession irrevocably passed to the trustees, and the enjoyment of the benefits or income thereof at once enured to the creator, and at his death to certain persons named in the instrument during the continuance of the trust, the absolute title to the corpus thereafter passing to definite persons

defined in the trust instrument. The interpretation of the trust deed is a question of law, in view of the facts found by the court. We, therefore, are of the opinion that a denial of the motion of the plaintiffs for judgment made during the trial and presumable at the close, was an error of law.

While the District Court did not rule on the application of Sec. 302 (c) of the Act of 1926, as amended by the Joint Resolution of 1931, and by the Act of 1932, we think that the title to all the decedent's interest in the estate of his brother had passed out of his hands by his confirmation of the trust deed of 1924 on October 22, 1926, subject to the income for life.

At the time of the transfer Sec. 302 (c) of the Act of 1926 applied only to estates transferred in contemplation of death. Since the District Court refused to find as a fact that the transfer was made for that purpose, it is straining the construction of the latter amendments in 1931 to 1932 to apply them to a transfer completed five or six years before. To give to the statutes above referred to a retroactive effect under such circumstances would be a violation of Art. V of the Constitution. Heiner v. Donnan, 285 U. S. 312; Nichols v. Coolidge et al., Exrs., 274 U. S. 531; Helvering v. Helmholz, supra; Poor v. White, supra.

In the case of Helvering v. Helmholz, supra, page 97, 98, the court said:

"Another and more serious objection to the application of Sec. 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter, or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. Reinecke v. Northern Trust Co., 278 U. S. 339. If Sec. 302 (d) of the act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. Nichols v. Coolidge, 274 U. S. 531."

While the provision of Sec. 302 (c) of the 1926 Act here involved is not the same as 302 (d) construed in Helvering v. Hemholz, supra, the principle involved is the same. In that case there was no power reserved to the creator alone to alter, amend, or revoke the trust instrument, but there was a completed, irrevocable, present transfer. In each case the Commissioner undertook to include in the gross estate, to be subject to an estate tax, property which had been conveyed away by an irrevocable transfer during the lifetime of the creator of the trust.

The defendant's contention that these statutes can have a retroactive effect where there has been an irrevocable transfer of the decedent's interest during his lifetime, even though he reserves the income of the property so conveyed, cannot prevail in view of the decisions of the Supreme Court above cited, together with Helvering v. St. Louis Union Trust Co., 296 U. S. 39; Becker v. St. Louis

Union Trust Co., 296 U. S. 48, 56, and Helvering v. City Bank Farmers Trust Co., supra. If doubt exists as to the construction of these statutes, it should be resolved in favor of the taxpayer. Gould v. Gould, 245 U. S. 151.

We think the District Court's interpretation of the trust instrument, in the light of the facts found by him and the admitted facts in the pleading, was error, and the motion of the plaintiffs for judgment should have been granted.

The judgment of the District Court is reversed with costs and the case is remanded to that court for further proceedings not inconsistent with this opinion.

On the same day to wit, June 1, 1937, the following judgment was entered:

Judgment

June 1, 1937

This cause came on to be heard April 23, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, June 1, 1937, here ordered, adjudged, and decreed as follows: The judgment of the District Court is reversed with costs and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the court:

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on June 24, 1937, a motion for stay of mandate was filed by appellee and was denied by the court.

Thereafter, to wit, on July 2, 1937, a mandate issued to the District Court.

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, hereto prefixed, contain and are a true copy of the record and all proceedings to and including August 20, 1937, in the cause in said court numbered and entitled, No. 3235. E. Sohier Welch et al., Executors, Plaintiffs, Appellants, v. Thomas B. Hassett, Individually and as Former Acting Collector, Defendant, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twentieth day of August, A. D. 1937.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE, 1937

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for hearing immediately following No. 406.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1937